Supreme Court, U.S.
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In The

Supreme Court of the United States

RUBICON INC. AND LEONARD B. SANFORD,

Petitioners,

versus

JOSEPH E. WILLIAMS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of Louisiana For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 29 U.S.C. § 2613(c)(1) of the Family and Medical Leave Act ("FMLA"), which provides that "the employer may require . . . that the eligible employee obtain the opinion of a second health care provider," is mandatory, as held by the Court below and several United States District Courts, or is merely permissive, as indicated by its plain language and as held by the United States Circuit Courts of Appeals for the Fourth and Eighth Circuits.

CORPORATE DISCLOSURE STATEMENT

One of the Petitioners, Rubicon Inc ("Rubicon"), is 50% owned by Huntsman International LLC ("Huntsman International") and 50% by Uniroyal Chemical Company, Inc. Huntsman International is 100% owned by Huntsman International Holdings LLC ("HIH"). HIH is 60% owned by Huntsman Specialty Chemicals Corp ("HSCC"), 30% owned by ICI Alta and 10% owned by Bank Equity. HSCC is 100% owned by Huntsman LLC Uniroyal Chemical Company is 100% owned by Crompton Corporation.

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PETITION FOR WRIT OF CERTIORARI

Rubicon Inc. and Leonard B. Sanford respectfully petition this Court for a writ of certiorari to review the final judgment of the Louisiana First Circuit Court of Appeal in *Williams v. Rubicon, Inc.*, 1998-1743 (La. App. 1st Cir. 9/24/99), 754 So.2d 1081, as to which review was ultimately denied by the Supreme Court of Louisiana in *Williams v. Rubicon, Inc.*, 2002-0802 (La. 12/4/02), 833 So.2d 942.

OPINIONS BELOW

On September 24, 1999, the Louisiana First Circuit Court of Appeal issued its opinion, *Williams v. Rubicon, Inc.*, 1998-1743 (La. App. 1st Cir. 9/24/99), 754 So.2d 1081 (Pet. App. 1), reversing the trial court's decision in favor of Petitioners (Pet. App. 16). Petitioners' application to the Louisiana Supreme Court for writs of certiorari was denied. *Williams v. Rubicon, Inc.*, 1999-3059 (La. 1/7/00), 752 So.2d 864 (Pet. App. 22). The case was remanded to the trial court, which issued its determination on damages (Pet. App. 23). On appeal, the Louisiana First Circuit Court of Appeal issued an opinion substantially affirming the trial court's damage award. *Williams v. Rubicon, Inc.*, 2001-0074 (La. App. 1st Cir. 2/15/02), 808 So.2d 852 (Pet. App. 31). Petitioners again sought a writ of certiorari from the Louisiana Supreme Court to review the opinion on damages. That application was unanimously granted, *Williams v. Rubicon, Inc.*, 2002-0802 (La. 6/7/02), 818 So.2d 852 (Pet. App. 56), but later denied as improvidently granted. *Williams v. Rubicon, Inc.*, 2002-0802 (La. 12/4/02), 833 So.2d 942 (Pet. App. 57). Petitioners' Application for Rehearing to the Louisiana Supreme Court was

denied on January 24, 2003. *Williams v. Rubicon, Inc.*, 2002-0802 (La. 1/24/03), 833 So.2d 942 (Pet. App. 58).

JURISDICTION

This Court has jurisdiction to review issues of federal law decided in state court cases pursuant to 28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where ... any title, right, privilege, or immunity is specially set up or claimed under the ... statutes of ... the United States.

Pursuant to this statute, this Court may exercise its jurisdiction when the highest court of a State rules and the decision becomes final:

> Whether a state-court judgment is subject to review by the Supreme Court on writ of certiorari is in turn governed by 28 U.S.C. § 1257, which provides that we have jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had. . . ."[1]

[1] *New York Times Co. v. Jascalevich*, 439 U.S. 1317, 1318 (1978).

When determining whether a state court decision is final, this Court holds that the decision appealed must be the last word from the highest court in that State:

> To be reviewable by this Court, a state-court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."[2]

The original appellate court decision on liability was not final because it remanded the case to the trial court for a determination of damages. After the trial court's final judgment was reviewed by the Court of Appeal, the Louisiana Supreme Court initially granted certiorari. However, that Court issued a *per curiam* opinion denying its earlier writ grant on December 4, 2002. On January 24, 2003, the Louisiana Supreme Court denied Petitioners' Application for Rehearing. Now that a final judgment has been rendered on all aspects of this case, this Court has jurisdiction to review the entire case.[3]

As a result of this Court's refusal to stay enforcement of the judgment pending decision on this petition for certiorari, Petitioners were forced to satisfy the judgment prior to decision on this Petition. Adding costs and interest to the base judgment of $780,363.00, the total payment

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[2] *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75, 81 (1997), *quoting Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945).

[3] *Hathorn v. Lovorn*, 457 U.S. 255, 261-62 (1982).

was $1,103,211.40. Petitioners' payment of the judgment does not, however, moot this Petition. Under Louisiana law, payment of the judgment prior to a decision on appeal or writ of certiorari does not moot the issue sought to be reviewed.[4] Should this Court grant certiorari and reverse the Louisiana appellate court's decision that conflicts with the decisions of the Fourth and Eighth Circuits, Petitioners intend to seek recovery of all sums paid to Respondent.[5]

This petition is being timely filed with the Clerk of this Court within the 90 days after January 24, 2003, allowed by this Court's Rule 13.1.

STATUTE INVOLVED IN THIS CASE

The pertinent provision of the Family and Medical Leave Act ("FMLA") relating to the Louisiana appellate court's decision on liability is 29 U.S.C. § 2613(c)(1), which states:

> In any case in which the employer has reasons to doubt the validity of the certification provided under subsection (a) of this section . . . the employer may require . . . that the eligible employee

[4] *See, e.g., J.C. Baker v. J.M. Nelson*, 265 So.2d 825 (La. App. 3rd Cir. 1972); *Walker v. Shreveport Rys. Co.*, 71 So.2d 683 (La. App. 2nd Cir. 1953).

[5] In fact, Respondent was specifically informed that Petitioners would seek full reimbursement of all funds expended in the event this Court reverses the Louisiana appellate court's decision.

obtain the opinion of a second health care provider. . . .

STATEMENT OF THE CASE

A. FACTS

Joseph Williams ("Respondent"), an at-will employee of Rubicon Inc. ("Rubicon"), was fired after his employer saw him working on another project while taking paid leave available only to those Rubicon employees who could do no work at all. Reversing a District Court judgment in Rubicon's favor, the Court of Appeal accepted Williams' argument that "Rubicon is strictly liable for violating" 29 U.S.C. § 2613(c)(1), which permits an employer to require a second opinion when he doubts an employee's qualification for leave under the Family and Medical Leave Act ("FMLA").[6] Permitting no further inquiry into Williams' condition, the Court of Appeal remanded for determination of damages, which were eventually imposed in the amount of $780,363.[7]

As a benefit to its employees, Rubicon provides a very generous ***paid*** sick leave policy. Because this leave is paid, Rubicon encourages its employees who are beneficiaries of the paid sick leave policy to return to work if they are able to perform light-duty work. As determined by the trial court, however, employees are ***not*** required by Rubicon's

[6] *Williams*, 754 So.2d at 1083 (Pet. App. 6).

[7] Trial Court's Reasons for Judgment, April 7, 2000 (Pet. App. 30).

policy to return on a limited-duty basis if they are unable.[8] It is only when an employee chooses not to return to light-duty, but is physically able to do so, that the employee continues the leave on a ***non-paid*** basis, under the FMLA, until the employee can return to normal duties.

In the instant case, Rubicon asked Respondent to ask his doctor whether Respondent was capable of performing light-duty work after his knee surgery. It is uncontroverted that Respondent failed to tell his supervisor that his doctor did not place ***any*** physical limitations upon him except to advise him that he could not return to his regular duties and that he should listen to his physical therapist. His physical therapist likewise did not place any restrictions on Respondent. As the District Court found, however, Williams told his supervisor "that Dr. Morgan told him that he should not return to work in any capacity."[9]

Rubicon naturally took Williams at his word and approved his paid leave in the amount of $5,000 per month. On January 19, 1995, however, Rubicon learned information that brought the veracity of Respondent's representations to his supervisor into question. Through a discussion among Respondent's co-workers, Respondent's supervisor learned that Respondent was seen on television working at a Red Cross relief site performing light-duty work that he previously represented he was unable to do.

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[8] Trial Court's Reasons for Judgment, February 23, 1998 (Pet. App. 17).

[9] *Id.* (Pet. App. 17).

After further investigation, Rubicon learned that Respondent drove an eight-ton canteen truck to the relief site and manned the vehicle (sitting and standing) for six hours. It was later learned that Respondent also delivered and manned the canteen truck the subsequent day, until it was no longer needed.[10] These physical activities were more demanding than any light-duty work Respondent would have been required to do at Rubicon under its paid leave policy. These facts, which are not disputed, led Rubicon to fire Williams.

B. PROCEEDINGS BELOW

Williams filed suit against Rubicon and Leonard B. Sanford, Rubicon's director of industrial relations, in the 23rd Judicial District Court in Ascension Parish. Only Louisiana causes of action were originally asserted; in filing his opposition to Petitioners' motion for summary judgment, Williams announced to the trial court for the first time that he intended formally to proceed under the FMLA.[11]

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[10] *Id.* (Pet. App. 18).

[11] During the depositions of Respondent and Len Sanford, Respondent's counsel made vague and fleeting references to the FMLA (that were objected to by counsel for Petitioners). As a result, Petitioners issued Requests for Admissions asking Respondent whether he intended to seek relief under the FMLA. Notably, Respondent never amended his Petition to assert a claim under the FMLA. Upon receipt of Respondent's answers indicating that he was seeking relief under the FMLA, Petitioners removed this case to federal court within 30 days of receipt of those answers. Pursuant to Respondent's Motion to Remand, however, the federal district court held that the vague and ephemeral references to the FMLA in the prior depositions were sufficient to put

(Continued on following page)

This matter was tried before the Honorable Ralph Tureau on January 14, 1998. After hearing testimony from the witnesses and reviewing the evidence, the trial court determined that Respondent misled his supervisors into believing that his doctor forbade him from performing light-duty work when, in fact, Respondent never even asked his doctor about working light-duty. Judge Tureau specifically determined: "[Petitioners] did not fire [Respondent] for taking FMLA qualified leave; They fired him because he was working . . . while they were paying him to be home recuperating from his surgery."[12]

The Louisiana First Circuit Court of Appeal reversed the trial judge's decision. The Court overturned the trial court's judgment, which held that Respondent had been fired for working while on paid leave after telling Rubicon he could not do so. Notwithstanding Respondent's obvious lack of veracity, the Court of Appeal reached the remarkable conclusion that "there is no evidence in the record that supports Rubicon's position that Mr. Williams violated any company policy."[13]

After setting aside the basis of the trial court's decision, the Court of Appeal did not remand for a determination of Respondent's actual medical condition at the time

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Petitioners on notice that Respondent was asserting an FMLA claim and thus ruled that Petitioners' removal was untimely. Unfortunately, Petitioners were statutorily precluded from seeking review of that decision.

[12] Trial Court's Reasons for Judgment, February 23, 1998 (Pet. App. 19-20).

[13] *Williams*, 754 So.2d at 1085 (Pet. App. 9).

of his firing. Instead, the Court determined that Petitioners violated the FMLA as a matter of law because they failed to obtain a second opinion regarding Respondent's medical condition before discharging him. Notwithstanding the plainly permissive language of the statute, the Court of Appeal quoted with approval from *Sims v. Alameda-Contra Costa Transit Dist.*, 2 F.Supp.2d 1253, 1262 (N.D. Cal. 1998), which declares, "The structure and internal logic of the Act also suggests that the certification procedures of [29 U.S.C. §] 2613 are the exclusive means for an employer to challenge the medical facts underlying the employee's certification."[14] The Court concluded, "Not only did Rubicon officials fail to follow the procedures set forth in the Act for obtaining medical certification regarding Mr. Williams' condition, they substituted their own judgment for the medical opinion of Mr. Williams' treating physician."[15] Instead of remanding for a determination of Respondent's condition, however, the case was remanded solely for a determination of damages.[16] Petitioners subsequently sought a writ of certiorari from the Louisiana Supreme Court, but that writ was denied on January 7, 2000.[17]

On remand from the Louisiana appellate court, the trial court awarded Respondent $780,363.00 in damages. The Louisiana First Circuit Court of Appeal affirmed the damage award by the trial court as follows:

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[14] *Williams*, 754 So.2d at 1086 (Pet. App. 11).

[15] *Id.* (Pet. App. 12).

[16] *Id.* at 1087 (Pet. App. 15).

[17] *Williams v. Rubicon, Inc.*, 1999-3059 (La. 1/7/00), 752 So.2d 864 (Pet. App. 22).

1. $127,417.00 for back pay;
2. $127,417.00 for liquidated damages;
3. $525,529.00 for front pay (an unprecedented 17 years);
4. $81,363.70 for attorney's fees;
5. legal interest on the damage awards (other than for attorney's fees) calculated from the date of the assertion of the FMLA claim – November 22, 1996; and
6. legal interest on the attorney's fee award calculated from the date of the decision to award fees – May 23, 2000.[18]

On March 15, 2002, Petitioners sought a writ of certiorari from the Louisiana Supreme Court from the Louisiana appellate court's decision on damages. That writ was unanimously granted on June 7, 2002.[19] On December 4, 2002, however, after briefing and oral argument, the Louisiana Supreme Court issued a *per curiam* decision recalling its June 7, 2002, writ grant.[20] Petitioners' Application for Rehearing was denied on January 24, 2003.[21]

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[18] *Williams v. Rubicon, Inc.*, 2001-0074 (La. App. 1st Cir. 2/15/02), 808 So.2d 852 (Pet. App. 31). The decision of the trial court was affirmed in its entirety except that the trial court's award of prejudgment interest on the "front pay" award was reversed.

[19] *Williams v. Rubicon, Inc.*, 2002-0802 (La. 6/7/02), 818 So.2d 766 (Pet. App. 56).

[20] *Williams v. Rubicon, Inc.*, 2002-0802 (La. 12/4/02), 833 So.2d 942 (Pet. App. 57).

[21] *Williams v. Rubicon, Inc.*, 2002-0802 (La. 1/24/03), 833 So.2d 942 (Pet. App. 58).

Petitioners then sought a stay of the judgment from the Louisiana Supreme Court by filing a Motion to Stay Judgment Pending Application for Certiorari to the United States Supreme Court. That motion was denied on January 31, 2003. Petitioners' Application for Stay to this Court was denied on February 25, 2003, by the Honorable Antonin Scalia, Associate Justice.

REASONS FOR GRANTING THE WRIT

A. A CONFLICT EXISTS BETWEEN THE LOUISIANA STATE COURT'S DECISION AND TWO FEDERAL CIRCUIT COURT DECISIONS REGARDING WHETHER A SECOND MEDICAL OPINION UNDER 29 U.S.C. § 2613(c)(1) IS MANDATORY OR PERMISSIVE.

Groucho Marx once asked, "Who are you going to believe, me or your own lying eyes?" According to the Louisiana appellate court, the FMLA requires an employer to believe a doctor who certifies that an employee cannot work even when the employer has seen that employee work with his own eyes. The Court held that the employer and the finder of fact must disregard filmed evidence of the employee working because the employer did not get a second medical opinion. The FMLA provision cited by the Court of Appeal provides:

> In any case in which the employer has reasons to doubt the validity of the certification provided under subsection (a) of this section . . . the employer ***may*** require . . . that the eligible employee obtain the opinion of a second health care provider. . . .

29 U.S.C. § 2613(c)(1) (emphasis added). For believing his own eyes, the employer was required to pay the present value of the employee's salary for the 17-year remainder of his working life, together with other damages, for a total of $780,363. Groucho would have been proud.

Unfortunately, the result in this case cannot be dismissed as an unrepeatable comedy of errors. At least three United States District Courts have agreed that, at least in some circumstances, the permissive language of § 2613(c)(1) is actually mandatory. While two United States Courts of Appeals have reached the contrary conclusion, the refusal of the Supreme Court of Louisiana to correct the injustice in this case demonstrates that this split in authority continues to threaten employers with dire consequences for entirely lawful behavior.

The path of error began in *Sims v. Alameda-Contra Costa Transit District*, 2 F.Supp.2d 1253 (N.D. Cal. 1998). According to *Sims*, the language of § 2613(c)(1) stating "the employer may require . . . that the eligible employee obtain the opinion of a second health care provider" was somehow ambiguous. As a result, the *Sims* court cited to the policy of the FMLA, its legislative history and the "structure and internal logic of the Act" to find support for its tortured conclusion that an employer's failure to utilize the second and third opinion procedures in the FMLA was a violation of the Act. Essentially, *Sims* transformed the obviously permissive "may" in 29 U.S.C. § 2613(c)(1) into a mandatory requirement. This disregard of the plain

statutory language has since been followed by two other District Courts.[22]

This line of cases, which Louisiana has now joined, squarely conflicts with the holdings of two United States Circuit Courts of Appeals. *Stekloff v. St. John's Mercy Health Systems,* 218 F.3d 858 (8th Cir. 2000); *Rhoads v. FDIC,* 257 F.3d 373 (4th Cir. 2001), *cert. denied*, 535 U.S. 933 (2002). Both cases recognize that the employee's medical condition is a proper subject for proof at trial, whether or not the employer has utilized the permissive remedy of § 2613(c)(1).

In *Stekloff*, the plaintiff had an argument with her supervisor about making personal telephone calls during work hours. Immediately thereafter, the plaintiff told her supervisor that she was too upset to continue working and therefore was leaving. The plaintiff contacted her physician, who met her at the hospital. Her physician wrote a note recommending that plaintiff not return to work for two weeks and plaintiff immediately placed the note in her supervisor's mailbox. Plaintiff was fired eight days later for "job abandonment."

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[22] *Miller v. AT&T*, 60 F.Supp.2d 574 (S.D. W.Va. 1999), *aff'd on other grounds*, 250 F.3d 820 (4th Cir. 2001); *Peterson v. Exide Corp.*, 123 F.Supp.2d 1265 (D. Kan. 2000). The *Peterson* court, in dictum, approved the *Sims* rule in more limited circumstances, finding that "the employer has a duty to request a second medical opinion if that employer doubts the employee's condition" unless the employer already has "contrary medical evidence" casting doubt on the original certification. 123 F.Supp.2d at 1271. The *Miller* court will not repeat its error, as the Fourth Circuit later repudiated the *Sims* rule.

As part of her case, the plaintiff argued that the defendant waived its right to contest the fact that she had a serious health condition because the employer failed to obtain a second medical opinion. Rejecting this argument, the Eighth Circuit stated:

> The language of § 2613(c)(1), however, is merely permissive: It states that an employer with "reason to doubt the validity" of the employee's certification "may" require the employee to obtain the opinion of a second health care provider. We do not read § 2613(c)(1) as requiring an employer to obtain a second opinion. . . .[23]

The Fourth Circuit reached a similar result in *Rhoads*. There, the plaintiff suffered from asthma and migraine headaches that were exacerbated by exposure to cigarette smoke. After she began having problems as a result of the second hand smoke of her co-workers, the plaintiff was allowed to take lengthy absences from work and eventually allowed to work at home. While she was working at home, her department was transferred to another location that adopted a smoke-free workplace rule. As a result, her employer asked her to report to work as of the date the smoke-free policy went into effect.

Prior to the smoke-free rule going into effect, plaintiff attended two meetings at her new work location and, allegedly because of the exposure to smoke, had a significant relapse. After seeing her doctors, they advised her not to report to work the day the smoke-free policy went into effect or for a week afterwards. When the plaintiff did not

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[23] *Stekloff*, 218 F.3d at 860.

appear for work, her employer insisted that she provide a note from her doctor certifying her absence. Ultimately, her employer explained that if she did not return to work by a certain date, she would be terminated. When plaintiff failed to return by that day, she was terminated.

According to the employer, the plaintiff's termination was justified by the plaintiff's excessive unexcused absences. Plaintiff, on the other hand, argued that her employer should have waited for her doctor's note to arrive before terminating her and alternatively, relying on *Sims*, that her employer waived its right to contest whether she had a serious health condition because it failed to follow the FMLA's second opinion procedures. The employer relied on the Fourth Circuit's reasoning in *Stekloff* that the second opinion procedures are only permissive, not mandatory. Agreeing with the employer, the court stated:

> We agree with the Eighth Circuit's assessment in *Stekloff*. . . . The FMLA provides only that an employer "may" seek a second, or third, opinion. . . . Because the term "may" is permissive, the plain language of the statute indicates that an employer who questions the validity of a certification has the option of seeking a second or third opinion, without being required to do so.[24]

The contrast between *Rhoads* and the decision of the Louisiana appellate court demonstrates the dangers of the *Sims* rule. The Louisiana court's requirement of a second opinion under § 2613(c)(1) effectively precludes an employer from relying on any reason to terminate an

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[24] *Rhoads*, 257 F.3d at 385-86.

employee who is taking leave under an FMLA certification. The Court held that § 2613(c)(1) "creates substantive rights that must be honored by employers," undermining the right to discharge on another basis.[25] As *Rhoads* indicates, the requirement of a second opinion is especially pernicious when an employee could be validly fired for other reasons:

> The evidence reflects, however, that even if [the employer] had received Dr. Chanales's letter prior to terminating Rhoads, the bank would have taken the same action, because Rhoads's supervisors had reason to disbelieve that she was sick. For example, during the time period culminating in Rhoads's termination – September 1-15, 1993 – she failed to answer her home telephone several times when SFSA officials called her; she did, however, return calls when paged on her beeper. Indeed, during the period of August 14-27, when Rhoads insists she was ill due to cigarette smoke exposure during the August 12 and 18 meetings at the Frederick Center, she used two vacation days but otherwise recorded working 7.5 hours per day on her time sheets. Moreover, the evidence adduced at trial showed that, during the weeks leading up to September 1, Rhoads moved apartments, drove to and attended a half-day orientation session at the University of Maryland in College Park, and signed up for full-time day classes at the university, scheduled to begin September 7.[26]

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[25] *Williams*, 754 So.2d at 1085 (Pet. App. 9).

[26] *Rhoads*, 257 F.3d at 379.

It is only the Louisiana appellate court's bizarre overturning of the trial court's factual finding that Respondent violated company policy which prevents its decision from conflicting with another well-established line of cases. The FMLA does not prevent an employer from discharging an employee who violates company policy simply because that employee is out on leave.[27] The FMLA was enacted to provide employees with the right to take reasonable leave for medical purposes in a manner that accommodates the legitimate interests of employers.[28] The FMLA was not designed to protect an employee who otherwise warrants disciplinary action. The *Sims* rule, particularly as applied in this case, creates a trap where an employer must fear being punished for failure to follow FMLA procedures when the substance of his decision really has nothing to do with the FMLA at all.

The conflict between the decision of the Louisiana appellate court and the decisions in *Stekloff* and *Rhoads* may not fall squarely within the language of this Court's Rule 10(b), which declares that a grant of certiorari may be appropriate when "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Although the Supreme Court of Louisiana heard argument in this case, it did not reach a decision on the merits, and therefore it did not set binding precedent throughout Louisiana. As a

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[27] *See, e.g., Pharakhone v. Nissan North America, Inc.*, 2003 WL 1720092 (6th Cir. 2003); *Kohls v. Beverly Enterprises Wisconsin, Inc.*, 259 F.3d 799 (7th Cir. 2001).

[28] 29 U.S.C. § 2601(b).

practical matter, however, the refusal of the Supreme Court to grant relief after full briefing and oral argument obviously enhances the importance of the opinion of the Court of Appeal. It will be a brave employer anywhere in Louisiana who will decline the option of seeking a second opinion after reviewing the result in this case.[29]

The practical effect of the decision of the Court of Appeal effectively subjects citizens in one state to a completely different and erroneous standard of liability with respect to whether a second medical opinion is required under the FMLA. Liability under a federal statute intended to embrace citizens from all states and territories should not differentiate simply because of geographic happenstance. In the instant case, that happenstance resulted in Petitioners being forced to pay a judgment in excess of $1.1 million simply because this case was tried in Louisiana as opposed to the Fourth or Eighth Circuits. For this very contingency, this Court's rules emphasize that conflicts between federal circuit courts and state court decisions are one of the compelling reasons for the exercise of this Court's jurisdiction. Petitioners respectfully request that this Court exercise that jurisdiction,

[29] As demonstrated by this case, the employer cannot necessarily rely on removal to federal court to protect him against state courts' interpretation of federal law. The vagaries of notice pleading and the technicalities of removal jurisdiction may very well combine to obscure the nature of an employee's cause of action until it is too late to remove. No employer is likely to take that chance where, as here, a mistake can cost him over a million dollars in damages.

grant their Petition for Certiorari, and reverse the Louisiana appellate court's erroneous decision.

CONCLUSION

Based on the foregoing reasons and legal authorities, Petitioners respectfully submit that this Court should grant its Petition for Certiorari and resolve the conflict between the Louisiana appellate court's decision and the federal appellate court decisions in *Stekloff v. St. John's Mercy Health Systems,* 218 F.3d 858 (8th Cir. 2000), and *Rhoads v. FDIC,* 257 F.3d 373 (4th Cir. 2001), *cert. denied*, 535 U.S. 933 (2002).

Respectfully submitted,

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754 So.2d 1081

Court of Appeal of Louisiana, First Circuit.

Joseph E. WILLIAMS

v.

RUBICON, INC. and Len Sanford.

No. 98 CA 1743.

Sept. 24, 1999. Writ Denied Jan. 7, 2000.

R. Bruce Macmurdo, Baton Rouge, for Plaintiff-Appellant Joseph E. Williams.

Alan Robert, Gonzales, for Defendants-Appellees Rubicon and Len Sanford.

M. Nan Alessandra, Michael F. Weiner, New Orleans.

Before: CARTER, C.J., LeBLANC, and PETTIGREW, JJ.

PETTIGREW, J.

Plaintiff, who was fired from his job while on paid sick leave, filed suit for damages against his former employer alleging defamation, intentional infliction of mental distress, and discrimination. The matter proceeded to trial on the merits, at which time the plaintiff pursued a claim for wrongful termination under the Family and Medical Leave Act. The trial court rendered judgment in favor of the employer and dismissed plaintiff's claims with prejudice. This appeal by plaintiff followed. We reverse and remand.

FACTS AND PROCEDURAL HISTORY

In February 1979, plaintiff, Joseph E. Williams, began working for Rubicon, Inc. as a lab technician. According to his supervisors, Mr. Williams had an exemplary work record. In fact, he had perfect attendance at work for approximately six years prior to January 3, 1995, when he underwent knee surgery for a torn medial meniscus in his right knee.

Mr. Williams learned in November 1994 that he was in need of the knee surgery. He notified his supervisor, Aki Miyagi, that he wanted to take a few days of vacation following the surgery and then return to work as soon as possible on a light-duty basis. Arthroscopic surgery was performed by Dr. Joe A. Morgan on January 3, 1995, at which time Dr. Morgan discovered that the damage to Mr. Williams' knee was more extensive than had been anticipated. Dr. Morgan examined Mr. Williams on January 10, 1995, and removed his staples. At that time, Dr. Morgan advised Mr. Williams that he could not return to work until after January 31, 1995, at which time his progress would be reevaluated. Dr. Morgan prescribed physical therapy and told Mr. Williams to "use crutches as needed."

Mr. Williams spoke with Mr. Miyagi on January 10, 1995, and told him that he would be out of work until at least January 31, 1995, as per Dr. Morgan's orders. Mr. Miyagi submitted a leave form for Mr. Williams at that time to facilitate Mr. Williams' paid sick leave. According to Mr. Miyagi, it was customary for Rubicon employees to receive one week of paid medical leave for every year of service. On January 11, 1995, Mr. Miyagi called Mr. Williams and requested that he provide Rubicon with a doctor's excuse. Mr. Williams mailed a doctor's excuse to Mary

Bowen, Rubicon's company nurse, on January 16, 1995. The note from Dr. Morgan, dated January 16, 1995, indicated that Mr. Williams was under Dr. Morgan's care and would be until January 31, 1995. While the note from Dr. Morgan was in fact received by Rubicon, the evidence adduced at trial indicated that Rubicon officials did not read the note prior to making the decision to terminate Mr. Williams' employment.

On January 18, 1995, Mr. Williams received a call from the American Red Cross, seeking his assistance in helping victims of a tornado that had struck in Brusly, Louisiana. Mr. Williams was an active volunteer member of the American Red Cross, but had taken his name off of the volunteer roster for January 1995 because of his knee surgery. When he was first contacted on January 18, he indicated that he was unable to assist because he was recuperating from knee surgery. The Red Cross official called a second time and told Mr. Williams that he was unable to reach any other volunteers to assist him. Mr. Williams agreed to help, but again indicated that he would be very limited in what he could do because of his knee. Later that day, Mr. Williams drove a canteen truck to the tornado site and served refreshments while sitting in the truck. He brought one crutch with him and remained at the tornado site for approximately six hours. He returned in the canteen truck on January 19, but was there for only an hour that day. A local news crew was covering the tragedy and happened to film Mr. Williams while he was standing in front of the canteen truck. According to Mr. Williams, he "was just standing beside the vehicle" stretching his legs. It was not until a couple of days later that Mr. Williams learned that he had been shown on the news.

Mr. Miyagi learned through other Rubicon employees that Mr. Williams was seen on the news doing volunteer work for the Red Cross. Believing that Mr. Williams' actions, i.e., working for the Red Cross while on paid sick leave for Rubicon, "was surely a violation of work ethics," Mr. Miyagi discussed the matter with his supervisor, Wayne Anton, Process Engineering Manager. Len Sanford, Director of Industrial Relations, and Toby Gerhold, Technical Manager, were ultimately advised of the situation regarding Mr. Williams. Rubicon officials viewed the tape, confirmed exactly what Mr. Williams had done for the Red Cross, and concluded that Mr. Williams had not been honest with them about his medical condition. Mr. Sanford contacted Rubicon's company doctor, Dr. John Fraiche, and requested that he contact Dr. Morgan to determine if Mr. Williams was capable of performing light-duty work. However, before receiving any medical information regarding Mr. Williams from either Dr. Fraiche or Dr. Morgan, Mr. Sanford, along with other Rubicon officials, made the decision to terminate Mr. Williams.

According to Mr. Williams, he received a conference call on January 26, 1995, from Mr. Sanford, Mr. Anton, and Mr. Miyagi notifying him of his termination from Rubicon effective January 31, 1995. Mr. Williams was told that what he had done for the Red Cross was "a gross violation of [Rubicon's] company policy." When Mr. Williams asked if he could go to Rubicon to talk with his supervisors, he was advised that he was being terminated and that there would be no discussion. As the call was ended abruptly by the Rubicon officials, Mr. Williams was not given an opportunity to explain his actions.

Mr. Williams returned to see Dr. Morgan on January 31, 1995, and advised Dr. Morgan that he had been fired.

Dr. Morgan examined Mr. Williams and determined that he was in need of additional physical therapy. Dr. Morgan offered to write a letter to Rubicon regarding Mr. Williams' condition. In a letter dated January 31, 1995, Dr. Morgan indicated that Mr. Williams was in need of three more weeks of physical therapy and was not being released to return to work at that time. Mr. Williams last saw Dr. Morgan on February 21, 1995, at which time he was released to return to work. When asked about Mr. Williams' physical abilities from January 10, 1995, through January 31, 1995, Dr. Morgan indicated that Mr. Williams was capable of light activities, but was not capable of working at regular duty and had not been released yet to return to light-duty work.

Following his termination from Rubicon, Mr. Williams filed suit against Rubicon and Mr. Sanford, alleging defamation, intentional infliction of mental distress, and discrimination on the grounds of disability, in violation of La. R.S. 23:1006, *et seq.*, La. R.S. 51:2231, *et seq.*, and La. R.S. 46:2254, *et seq.* The defendants filed a motion for summary judgment asserting that all of Mr. Williams' claims should be dismissed because there were no genuine issues of material fact in dispute. Mr. Williams opposed the motion for summary judgment by asserting that he intended to proceed under the Family and Medical Leave Act ("FMLA" or "the Act"). The motion was summarily denied by the trial court without reasons.

The matter proceeded to trial, at which time Mr. Williams stipulated that he would only pursue his claim for wrongful termination under the FMLA. After hearing the evidence, the trial court rendered judgment in favor of Rubicon and Mr. Sanford, dismissing Mr. Williams' claim

with prejudice. Mr. Williams has appealed this judgment assigning the following specification of error:

> The Trial Court erred by analyzing the Family and Medical Leave Act as if it were an anti-discrimination statute that required plaintiff to prove Rubicon was motivated by an anti-FMLA bias and then by concluding that the law was not violated. Rubicon is strictly liable for violating the FMLA requirement to obtain medical certification if it doubted that he [Williams] had a condition that prevented him from work and ultimately for failing to restore Williams to his job.

FAMILY AND MEDICAL LEAVE ACT

Under the Family and Medical Leave Act of 1993, an eligible employee with a "serious health condition that makes the employee unable to perform the functions of the position of such employee" is entitled to up to twelve weeks of medical leave. 29 U.S.C. § 2612(a)(1)(D).[1] Employees who take leave pursuant to the Act are entitled to return to the same or equivalent position as they had prior to the leave. 29 U.S.C. § 2614(a)(1).

An employer may require that the employee's request for leave "be supported by a certification issued by the health care provider of the eligible employee." 29 U.S.C. § 2613(a). An employee's medical certification "shall be sufficient" if it contains the following information: "(1) the

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[1] It is undisputed that Rubicon is a covered employer and that Mr. Williams was a covered employee under the Act. *See generally,* 29 U.S.C. § 2611.

date on which the serious health condition commenced; (2) the probable duration of the condition; (3) the appropriate medical facts within the knowledge of the health care provider regarding the condition; [and] (4) . . . a statement that the employee is unable to perform the functions of the position of the employee." 29 U.S.C. § 2613(b). Furthermore, the Act provides the following certification procedure an employer may utilize if it questions the validity of the medical certification submitted by the employee:

> **(c) Second Opinion**
>
> **(1) In general**
>
> In any case in which the employer has reason to doubt the validity of the certification provided . . . the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any information certified under subsection (b) of this section for such leave.
>
> **(2) Limitation**
>
> A health care provider designated or approved under paragraph (1) shall not be employed on a regular basis by the employer.
>
> **(d) Resolution of conflicting opinions**
>
> **(1) In general**
>
> In any case in which the second opinion described in subsection (c) of this section differs from the opinion in the original certification provided under subsection (a) of this section, the employer may require, at the expense of the employer, that the employee obtain the opinion of a

> third health care provider designated or approved jointly by the employer and the employee concerning the information certified under subsection (b) of this section.
>
> **(2) Finality**
>
> The opinion of the third health care provider concerning the information certified under subsection (b) of this section shall be considered to be final and shall be binding on the employer and the employee.

29 U.S.C. § 2613.

The FMLA declares it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided" in the Act. 29 U.S.C. § 2615(a)(1). Further, it is "unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful" under the Act. 29 U.S.C. § 2615(a)(2).

DISCUSSION

Mr. Williams argues on appeal that the trial court erred in "analyzing the FMLA as if it were an anti-discrimination statute that required [him] to prove that [Rubicon] was motivated by anti-FMLA bias." He alleges that the trial court erroneously focused on Rubicon's motive or intent in determining whether the FMLA was violated. Mr. Williams asserts that he is not required to show Rubicon's Intent to retaliate because he was not fired "for opposing any practice made unlawful" under the provisions of the FMLA. Rather, he has a "substantive claim under the FMLA since he was not restored to his position after he took qualified leave." Mr. Williams continues, noting

that "Rubicon violated the FMLA by failing to seek, when it had the occasion to doubt whether [Mr.] Williams was truly unfit to work, the medical certification explicitly required in such a situation."

Rubicon counters, arguing "that the FMLA does not prevent an employer from discharging an employee who violates company policy, simply because that employee is out on leave." Rubicon maintains that "[Mr.] Williams would have been discharged for violating company standards of ethics and trust whether or not he was out on leave at the time." While we agree with Rubicon that the FMLA does not act to prevent an employer from discharging an employee who is in violation of company policy, the fact remains that the FMLA creates substantive rights that must be honored by employers. *Diaz v. Fort Wayne Foundry Corporation,* 131 F.3d 711, 712 (7th Cir.1997).

After a review of the record in this case, it is clear that Rubicon did not honor Mr. Williams' substantive rights pursuant to the FMLA. Rubicon failed to follow the procedures set forth in the FMLA for obtaining the required medical certification regarding the "serious health condition" that prevented Mr. Williams from performing the functions of his job at Rubicon. Further, there is no evidence in the record that supports Rubicon's position that Mr. Williams violated any company policy. Mr. Sanford and other Rubicon officials admitted that Rubicon does not require employees who are on leave to return to work if they have been told by their doctor to stay off work or if they have not been cleared by their doctor to return to work.

While the cases addressing the FMLA are sparse, there is one case, *Sims v. Alameda-Contra Costa Transit*

District, 2 F.Supp.2d 1253 (N.D.Cal.1998), wherein the court detailed the history of the FMLA and specifically addressed the issue of the utilization of the "second opinion" procedure set forth in the Act. The *Sims* court found as follows:

> The statutory scheme is designed to have medical determinations made by health care providers, rather than courts. *See Reich v. The Standard Register Co.*, 1997 WL 375744, 1997 U.S. Dist. LEXIS 3021, (W.D.Va.1997) ("The FMLA contemplates that decisions of whether an employee has a 'serious health condition' will be made by doctors."). In responding to comments by the U.S. Small Business Administration (SBA) on the interim regulations adopted by the DOL [Department of Labor], the DOL explained that employers are not to make the medical judgments as to whether a particular medical condition is a serious health condition justifying leave under the Act:
>
> > SBA mistakenly presumes that this is a judgment that the statute and regulations permit an employer to make. If the health condition meets the definition in the regulations at § 825.114 and, as provided in §§ 825.305-825.307, an employee furnishes a completed DOL-prescribed medical certification from the health care provider, *the only recourse available to an employer that doubts the validity of the certification is to request a second medical opinion at the employer's expense.* Employers may not substitute their personal judgments for the test in the regulations or the medical opinions of the health care providers of employees . . . to determine

> whether an employee is entitled to FMLA leave for a serious health condition.

60 Fed.Reg. 2180, 2235 (1995) (emphasis added).

. . . .

The structure and internal logic of the Act also suggests that the certification procedures of [29 U.S.C. §] 2613 are the exclusive means for an employer to challenge the medical facts underlying the employee's certification. Although the regulations explicitly permit an employer to deny leave to an employee who fails to produce "a requested medical certification," 29 C.F.R. § 825.312(b), there is no explicit authority for an employer to deny leave to an employee who does produce medical certification. To the contrary, Congress stated that if an employee's medical certification meets certain requirements, it "shall be sufficient." 29 U.S.C. § 2613(b). If an employer has the choice of skipping the certification process and engaging instead in additional discovery of medical facts, the term "sufficient" is rendered meaningless.

Moreover, the Act provides that if an employer does seek a second (or third) medical opinion, "the employee is provisionally entitled to the benefits of the Act" while that process is being pursued. 29 C.F.R. § 825.307(a)(2). By specifying that the employee is to receive the benefits of the FMLA during the pendency of the second-opinion process, this provision implies that the employee's submission of a complete medical certification is sufficient to trigger FMLA protection unless and until there is contrary medical evidence. The provision suggests that the second

> and third medical opinion process is the exclusive verification option for an employer who has reason to doubt the validity of the employee's original certification. Moreover, the opinion of the third health care provider "shall be considered to be final and shall be binding on the employer and the employee." 29 U.S.C. § 2613(d)(2). This final and binding procedure ensures a speedy determination of an employee's need for medical leave where the employer had reason to question the validity of the initial certification.

Sims, 2 F.Supp.2d at 1261-62.

While the facts of *Sims* are distinguishable from the facts of the instant case, the discussion of the certification procedure set forth in the FMLA is very helpful in our analysis. Not only did Rubicon officials fail to follow the procedures set forth in the Act for obtaining medical certification regarding Mr. Williams' condition, they substituted their own judgment for the medical opinion of Mr. Williams' treating physician.

After being notified that Mr. Williams could not return to work until after his progress was reevaluated by Dr. Morgan on January 31, 1995, Mr. Williams' supervisor, Mr. Miyagi, requested that Mr. Williams provide Rubicon with a doctor's excuse. Although Mr. Williams did as requested, Rubicon officials did not even look at the note until after Mr. Williams was fired. According to the testimony of Mr. Sanford, this note from Dr. Morgan played no part in his decision to terminate Mr. Williams. Mr. Sanford indicated that he had already received information regarding Mr. Williams' condition from Mr. Miyagi and "was operating on the assumption that it was all completely correct." Pursuant to Rubicon's company policy, Mr. Williams remained

out of work on paid sick leave from the date of his surgery through his termination.

Rubicon officials subsequently learned that Mr. Williams had been seen on a local newscast, assisting tornado victims in Brusly, Louisiana, as part of his work as a Red Cross volunteer. They confirmed that Mr. Williams had in fact driven a canteen truck to the tornado site and manned the truck for approximately six hours on January 18, 1995. After learning this information, Mr. Sanford asked the company doctor to contact Dr. Morgan to determine whether Mr. Williams was physically capable of performing light-duty work. According to Rubicon's own policy, Mr. Williams would have to be cleared by his doctor before returning to work on a light-duty basis. However, rather than waiting to hear from Dr. Morgan regarding Mr. Williams' capabilities, Rubicon officials decided on January 26, 1995, to terminate Mr. Williams for a breach of company ethics. Rubicon officials later received a letter from Dr. Morgan dated January 31, 1995. According to this letter, Mr. Williams was still being treated by Dr. Morgan, had not been released to return to work, and was to continue in physical therapy for three additional weeks. When asked why they did not wait to hear from Dr. Morgan before deciding to terminate Mr. Williams, Mr. Sanford responded, "[w]e didn't feel like it was necessary." Thus, by their own admission, Rubicon officials were unaware on January 26, 1995, that Mr. Williams had not been released by Dr. Morgan, and therefore, would not have been able to return to work at Rubicon even on a light-duty basis.

Mr. Sanford acknowledged that Mr. Williams was covered by the FMLA. He further testified that he was aware of the procedures set forth in the Act for obtaining a

second opinion in cases where there is doubt about an employee's medical condition. Mr. Sanford indicated, however, that their decision to fire Mr. Williams was based on common sense and had nothing to do with the FMLA.

> [W]e weren't thinking in terms of Family and Medical Leave Act, we were thinking in terms of common sense and the fact that he was being paid full medical leave under our sick leave program. In addition, since we were paying his full salary, we think, we felt we deserved a more trustworthy type of situation based on the information that we had. We felt like what was happening was wrong.

The following colloquy between Mr. Williams' counsel and Mr. Sanford further evidences Rubicon's complete disdain for the procedures set forth in the FMLA:

> Q. . . . Under Rubicon's policies, Joe Williams was not able to come back to do light duty work before January 31st, because his doctor did not clear him to do so?
>
> A. That is correct.
>
> Q. You have no information from any medical source to indicate that Joe Williams jeopardized his recovery by going out on [sic] the [tornado] site, do you?
>
> A. Not from a medical point of view. Common sense says that he is running a risk of injuring himself.
>
> Q. This decision was made strictly based on your internal common sense deliberations without any input from doctors, correct?
>
> A. That is correct.

Following our thorough review of the record, we are convinced that the trial court erred in finding that Rubicon's actions did not constitute a violation of the FMLA. Rubicon and Mr. Sanford clearly failed to honor the statutory entitlements that Mr. Williams was afforded by the Act. The trial court clearly erred in analyzing Mr. Williams' claim, and thus, did not address Rubicon's liability to Mr. Williams for damages pursuant to 29 U.S.C. § 2617. However, the record before us does not contain sufficient information for this court to adequately address the issue of damages. Therefore, we remand this matter to the trial court for a determination of damages consistent with this opinion and the pertinent provisions of the Act.

DECREE

For the foregoing reasons, the judgment of the trial court dismissing Mr. Williams' claim with prejudice is reversed, and the matter is remanded to the trial court for further proceedings consistent with this opinion. Costs associated with this appeal are assessed against defendants/appellees, Rubicon and Mr. Sanford.

REVERSED AND REMANDED.

23RD JUDICIAL DISTRICT COURT
PARISH OF ASCENSION
STATE OF LOUISIANA

NO. 56,075

JOSEPH E. WILLIAMS
VERSUS
RUBICON, INC. AND LEN SANFORD

REASONS FOR JUDGMENT

(Filed Feb. 23, 1998)

This matter was tried on the 14th day of January, 1998. After the evidence was presented to the Court in this bench trial, all parties were given an opportunity to file a post-trial memorandum. After hearing the evidence and considering the pleadings and memoranda filed herein, and for the written reasons which follow, this Court finds in favor of the Defendants, **Rubicon, Inc. and Len Sanford**.

Findings of Fact

Plaintiff, Joe Williams, was an at-will employee who was allegedly fired for violating "company standards of ethics and trust". Mr. Williams sued his employer (the defendants) for allegedly violating the Family Medical Leave Act ("FMLA").

The evidence presented at trial proved the following facts:

1. Plaintiff, Joe Williams, had been employed at Rubicon since 1979.

2. Plaintiff's attendance record at Rubicon was exemplary.

3. Plaintiff's job performance over the 16 years that he worked at Rubicon was excellent.

4. Plaintiff took paid leave for knee surgery on January 3, 1995.

5. Prior to taking the leave, Plaintiff discussed with his Rubicon supervisor the possibility of returning to work to perform "light duty" work if and when Plaintiff was physically able (according to his physician).

6. Defendants did not object to the leave, nor did they interfere with the leave.

7. The performance of "light duty" work was not a requirement or a condition of the paid leave; if plaintiff was not physically able to do "light duty" work, he would be allowed to remain on paid leave until he recuperated.

8. On January 10, 1995, Plaintiff's treating physician, Joe Morgan, told Plaintiff that he should stay away from work until the next appointment which was scheduled for January 31, 1995.

9. During that visit on January 10, 1995, Plaintiff did not ask, nor did Dr. Morgan specify whether or not Plaintiff could perform "light duty" work.

10. On that same day, January 10, 1995, Plaintiff informed his supervisor, Mr. Miyagi, that he would be off of work through at least January 31, 1995; Plaintiff told Mr. Miyagi that Dr. Morgan told him that he should not return to work in any capacity.

11. Defendants did not object to the continued leave, nor did they interfere with the continued leave.

12. On the 18th and 19th of January, 1995, while still on paid leave, Plaintiff worked as a volunteer for the Red Cross. On January 18th, Plaintiff drove a "canteen truck", an eight-ton vehicle from Red Cross headquarters to the disaster site, where he dispensed food and beverages for six (6) hours. On the 19th, Plaintiff drove the canteen truck to the site, but he was not needed.

13. Plaintiff could have told Red Cross that he was unable to assist because he was recovering from knee surgery.

14. Plaintiff's co-employees saw him on television "manning" the canteen truck; They reported the incident to their supervisors at Rubicon.

15. The Rubicon supervisors contacted Red Cross to verify the allegations; A Red Cross representative ultimately confirmed the story.

16. On January 26, 1995, Plaintiff was fired because his Rubicon supervisors felt that he had violated company standards of ethics and trust by working for the Red Cross while he was on paid leave.

Law and Analysis

The Family Medical Leave Act (FMLA) was enacted on February 5, 1993. It entitles qualified employees (such as the plaintiff in this case – Joe Williams) to take up to 12

weeks of unpaid leave per year for the birth or adoption of a child, to care for a spouse or an immediate family member with a serious health condition, or when unable to work because of the employee's own serious health condition. Under the Act, the term "serious health condition" is intended to cover conditions or illnesses affecting one's health to the extent that inpatient care is required, or absences are necessary on a recurring basis or for more than a few days for treatment or recovery.

The FMLA provides in pertinent part as follows:

> "It is unlawful for an employer to: (1) interfere with, restrain, or deny the exercise of (or attempt to exercise) any right provided in the Act; or (2) discharge or in any other manner discriminate against any individual for opposing or complaining about any unlawful practice under the Act. . . . "

Employers are prohibited from discharging an employee for requesting to take or for actually taking qualified leave. At the end of the leave, the employee is to be returned to the same position that he was in prior to the leave.

In the present case, it was established at trial that Rubicon did not object to Mr. Williams' request to take off of work for knee surgery. In fact, they paid him his full salary while he was on that leave. Nor did Rubicon object to Mr. Williams' need for an extension of his leave for recuperation or his inability to return in a light-duty capacity. It was not until Mr. Williams was seen on television working for the Red Cross that Rubicon decided to discharge Mr. Williams. Rubicon did not fire Mr. Williams for taking FMLA qualified leave; They fired him

because he was working for the Red Cross while they were paying him to be home recuperating from his surgery.

Rubicon felt that if Mr. Williams thought it was acceptable to Dr. Morgan for Mr. Williams to work for Red Cross, then it must have been equally acceptable for Mr. Williams to work for Rubicon in a light-duty capacity (ie, sitting at a desk). If Dr. Morgan did not think that Mr. Williams should return to Rubicon in any capacity, then it should have been equally clear to Mr. Williams that Dr. Morgan did not want Mr. Williams working for Red Cross in any capacity either. Under the circumstances, Rubicon felt that Mr. Williams was either misrepresenting his actual capabilities or he was jeopardizing his recovery, thereby causing his paid leave with Rubicon to become extended.

This Court's only function is to determine whether or not Rubicon violated the Family Medical Leave Act or otherwise unlawfully discriminated against Mr. Williams by discharging him. Considering the fact that Mr. Williams had maintained an exemplary attendance record and had demonstrated excellent performance at Rubicon, this Court may feel that Rubicon acted unwisely under the circumstances. Unfortunately, the Court's opinion on that issue is not relevant to the decision that needs to be made. As an at-will employee, Mr. Williams could be discharged for any reason (including no reason), at any time, without notice and without incurring liability for wrongful discharge. An exception to this unqualified right to discharge an at-will employee is that the employee's discharge cannot be for reasons prompted by unlawful discriminatory motives. In addition, the employer cannot violate the Family Medical Leave Act. The plaintiff in this case has failed to prove that his discharge was unlawful.

Conclusion

For the foregoing reasons, this Court finds that Plaintiff, Joseph E. Williams, has failed to prove by a preponderance of the evidence that Defendants, Rubicon, Inc. and Len Sanford, violated the Family Medical Leave Act by discharging him. In addition, Plaintiff failed to prove that Defendants violated any anti-discriminatory law whatsoever when they discharged Plaintiff. Accordingly, Plaintiff's suit is dismissed with prejudice. Each party is responsible for his own costs associated with these proceedings.

SIGNED and rendered at Gonzales, Louisiana this 19th day of February, 1998.

/s/ Ralph Tureau
RALPH TUREAU, JUDGE
23RD JUDICIAL
DISTRICT COURT
DIVISION "A"

752 So.2d 864

Supreme Court of Louisiana

Joseph E. WILLIAMS

v.

RUBICON INC., and Len Sanford.

No. 1999-C-3059.

Jan. 7, 2000.

Prior report: La.App., 754 So.2d 1081.

In re Rubicon Inc. et al.; Sanford, Len; – Defendant(s); applying for writ of certiorari and/or review, Parish of Ascension, 23rd Judicial District Court Div. A, Nos. 56,075; to the Court of Appeal, First Circuit, No. 98-CA-1743.

Denied.

JOHNSON, J., not on panel.

VICTORY and TRAYLOR, JJ., would grant the writ.

23RD JUDICIAL DISTRICT COURT
PARISH OF ASCENSION
STATE OF LOUISIANA

NO. 56,075

JOSEPH E. WILLIAMS
VERSUS
RUBICON, INC. AND LEN SANFORD

REASONS FOR JUDGMENT

(Filed Apr. 7, 2000)

Procedural Posture

This matter was tried to the Court on the 14th day of January, 1998. After the evidence was presented, all parties were given an opportunity to file a post-trial memorandum. After hearing the evidence and considering the pleadings and memoranda filed herein, the Court found in favor of the Defendants, Rubicon, Inc. and Len Sanford and dismissed the plaintiff's claims with prejudice. Specifically, the court found that plaintiff, Joseph Williams, an at-will employee of Rubicon, Inc., failed to prove by a preponderance of the evidence that Rubicon violated the Family Medical Leave Act or any other anti-discriminatory law when it fired Mr. Williams. Mr. Williams appealed to the Louisiana First Circuit Court of Appeal. Pursuant to its finding that Mr. William's discharge violated the FMLA, the First Circuit reversed and remanded for an award of damages consistent with the pertinent provisions of the Act. After considering all pleadings and memoranda filed herein, including the attorneys' briefs on remand, this court issued the following reasons for judgment on the issue of damages.

Relevant Law

The Family Medical Leave Act

The FMLA provides that an employer who violates the Act shall be liable "for damages" equal to the amount of (1) the wages and employment benefits, past and future, lost to the employee by reason of the violation, (2) interest on the lost wages and benefits, (3) "liquidated" or double damages equal to the lost wages, benefits and interest thereon, unless the employer can prove that it acted in good faith and had a reasonable ground for believing that the act or omission was not a violation of the FMLA (emphasis added), and (4) such equitable relief as may be appropriate, including employment, reinstatement, and promotion". 29 U.S.C. s. 2617 (a)(1). Additionally, the Act provides for a mandatory award of attorney's fees, expert witness fees and other costs. 29 U.S.C. s. 2617 (a)(3).

Neither damages for mental distress nor punitive damages are available under the Act. *McAnnally v. Wyn south Molded Products, Inc.*, 912 F.Supp. 512, 513 (N.D. Ala. 1996). Moreover, a plaintiff has the duty of mitigating his damages to the extent reasonably possible and is not entitled to recover for damages that could have been avoided through such mitigation. *Booker v. Taylor Milk Co., Inc.*, 64 F.3rd 860, 864 (3rd Cir. 1994 (Title VII); *Sellers v. Delgado College*, 902 F.2d 1189, 1191 (5th Cir. 1990) (Title VII); *Smith v. Great American Restaurants, Inc.*, 969 F.2d 430, 438 (7th Cir. 1991); (ADEA); *Murphy v. City of Flagler Beach*, 846 F.2d 1308, 1309 (11th [sic] 1988) (Section 1983). Any award of back pay or front pay must be discounted by any sums that reasonably could have been earned, plus any sums actually earned. *Troy v. Bay State Computer Group*, Inc., 141 F.3d 378, 382 (1st Cir. 1998); *McDonnell v. Miller Oil Company, Inc.*, 110

F.3d 60 (table), 1997 WL 153820 (4th Cir. Va.). In the context of employment discrimination, the burden rests on the defendant to prove that the plaintiff has failed to reasonably mitigate his damages, and that there was a reasonable likelihood that the plaintiff might have found comparable work by exercising reasonable diligence. *Jacobs v. NOPSI*, 432 So.2d 643 (La. 1983); *Hanna v. American Motors Corp.*, 724 F.2d 1300 (7th Cir. 1984); *Rasimas v. Mich. Dept of Mental Health*, 714 F.2d 614 (1983); *Jackson v. Shell Oil Co.*, 702 F.2d 197 (9th Cir. 1983); *Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228 (7th Cir. 1986).

Application

At the outset, it is important to note the First Circuit's conclusion that Rubicon acted with "complete disdain for the procedures set forth in the FMLA", and that "there is no evidence in the record that Mr. Williams violated any company policy." Additionally, the Court noted that "Mr. Williams had an exemplary work record" and "perfect attendance at work for approximately six years prior to January 3, 1995, when he underwent knee surgery for a torn medial meniscus in his right knee".[1] The opinion of this court on the issue of damages, particularly liquidated damages, must be rendered in light of this evaluation.

[1] Judgment for the First Circuit Court of Appeal, rendered September 24, 1999.

1. Lost Wages.

Mr. Williams made over $60,000.00 during his last two years at Rubicon, enjoyed excellent health care and vacation benefits, and was contributing to a 401k savings plan. He was terminated by Rubicon for alleged ethical misconduct after sixteen years of employment. On the effective date of his termination, January 31, 1995, Mr. Williams began to send out resumes. Because companies in the chemical industry generally do not offer starting salaries to lab operators based on their work experience at other businesses, Mr. Williams was at a significant disadvantage in his effort to find comparable employment with comparable pay. Unsuccessful in his attempt, Mr. Williams ultimately secured employment as a medical technician at Earl K. Long Hospital in Baton Rouge, and made almost thirty five thousand dollars ($35,000) in 1998. The record reflects that Mr. Williams worked the midnight shift in order to provide for his wife and children.

Dr. James Richardson of Louisiana State University, plaintiff's chief economic advisor, testified at trial that Mr. Williams was deprived of $127,417.00 in salary and benefits between the effective date of his termination and the date of trial on January 14, 1998.[2] Additionally, Dr. Richardson testified that the present value of Mr. Williams projected post-trial income loss is $525,529.00 through retirement at age sixty one. Dr. Richardson based this opinion on the disparity between Mr. Williams projected future income as an employee of Rubicon and his projected future income as an employee of Earl K. Long. In

[2] Dr. Richardson applied a 6.12% discount rate.

reaching this conclusion, Dr. Richardson found that Mr. Williams will continue to sustain the differential between his hospital employment and his former job at Rubicon for the rest of his work life. Additionally, Dr. Richardson took into account Mr. William's age (he is now forty seven) and the fact that Mr. William's employment opportunities in his field of expertise have been significantly diminished due to his termination from Rubicon for an ethical violation. Dr. Richardson [sic] valuations were premised ultimately on his reasonable belief that Mr. Williams will probably never be able to recapture the salary increases that he had acquired through sixteen (16) years of exemplary service at Rubicon.

After considering the trial record and memoranda submitted, the Court concludes that Dr. Richardson's valuations of Mr. Williams lost wages, past and future, are reasonable and comport with FMLA guidelines.

2. Mitigation of Damages.

Rubicon argues that because Mr. Williams failed to take reasonable efforts to mitigate his damages, his award should be reduced by the extent of his failure. The record reflects that Mr. Williams submitted a number of job applications in the three years between his being fired and the trial. (Rec. 640). Additionally, Mr. Williams had registered with Olsten Staffing and Tempco Employment Company, the same two employment agencies which Rubicon uses to locate its lab technicians. (Rec. 567). During the three year hiatus, Mr. Williams was offered one $10.00 an hour job as a laboratory technician through Olsten and had interviewed with Formosa Plastics. Despite Mr. William's sixteen years of experience, Formosa

was unwilling to make an exception to its $8.00 an hour starting pay rate, a pay rate which was probably comparable to the beginning pay rate at other companies in the area. Contrary to the argument urged by Rubicon, there is no evidence that Mr. William's salary at Formosa would definitely have been increased after four years to bring it in line with his salary at Rubicon. Moreover, as the court has already emphasized, it is reasonable to suspect that the circumstances of his discharge from Rubicon would have adversely impacted his ability to gain employment at Formosa (or any other major industrial company) and will continue to impede his ability to find comparable employment in the future. Assuming Mr. Williams was able to find such employment, there is little doubt that his upward mobility and salary within the company would be substantially and adversely affected by his inauspicious discharge from Rubicon.

Finally, it is revealing to note that Mr. Williams was respectably employed for all but two months of the three years between his termination from Rubicon and his trial. This fact is another indication to the Court that Mr. Williams is a motivated and conscientious worker whose inability to secure comparable employment was not due to a lack of effort on his part, but to circumstances largely beyond his control.

3. Liquidated Damages.

As the court has noted, the FMLA expressly provides for liquidated damages unless the Court in its discretion finds that such an award would be unfair in light of evidence that the employer acted in good faith and reasonably believed that its actions did not violate the FMLA.

The burden of proof is on the defendant to prove an exceptional, good faith reason why it should not be held liable for liquidated damages.

In the present case, the First Circuit found that Rubicon acted with "utter disdain" for the FMLA. This determination by the Court of Appeal precludes a finding by this court that Rubicon acted in reasonable good faith in discharging Mr. Williams. On the contrary, the court is compelled to conclude that Rubicon acted in knowing and willful disregard for the FMLA. As a result, an award of liquidated damages is appropriate.

Conclusion.

In summary, the court makes the following findings regarding damages in the present case:

1) Dr. Richardson's assessment of damages suffered by Mr. Williams as a result of his unlawful discharge from Rubicon is reasonable and consistent with FMLA requirements;

2) Rubicon failed to establish by a preponderance of the evidence that Mr. Williams did not take reasonable efforts to mitigate his damages by timely seeking comparable employment elsewhere. As such there should be no reduction in Mr. William's damage award;

3) Rubicon has not established by a preponderance of the evidence a reasonable and good faith belief that its actions did not violate the FMLA. As such, an award of liquidated damages is appropriate.

In light of the above findings, the court makes the following specific monetary award to Mr. Williams:

Liquidated Past Lost Wages:	
$127,417.00 X 2 =	$254,834.00
Future Lost Wages:	$525,529.00
Total:	**$780,363.00**

This court defers ruling on Mr. William's claim for attorneys fees until argument can be heard on the matter.

Rendered at Gonzales, Louisiana this 7 day of April, 2000.

/s/ Ralph Tureau
RALPH TUREAU, JUDGE
23RD JUDICIAL
DISTRICT COURT
DIVISION "A"

808 So.2d 852

Court of Appeal of Louisiana,
First Circuit.

Joseph WILLIAMS
v.
RUBICON, INC. and Len Sanford.

No. 2001 CA 0074.

Feb. 15, 2002.

R. Bruce MacMurdo, Baton Rouge, Victor L. Marcello, Gonzales, for Plaintiff-Appellee Joseph Williams.

Alan J. Robert, Gonzales, H. Alston Johnson, III, Baton Rouge, M. Nan Alessandra, Larry E. Demmons, New Orleans, for Defendants-Appellants Rubicon, Inc. and Len Sanford.

Before: FOIL and PETTIGREW, JJ., and KLINE,[1] J. Pro Tem.

PETTIGREW, Judge.

In this case, plaintiff pursued a claim against his former employer for wrongful termination under the Family and Medical Leave Act ("FMLA"). The trial court rendered judgment in favor of plaintiff, awarding damages and attorney fees in the amount of $861,726.70, plus judicial interest. This appeal by the employer followed. For the reasons set forth below, we amend, and as amended, affirm.

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[1] Judge William F. Kline, Jr., retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

FACTS AND PROCEDURAL HISTORY

Plaintiff, Joseph E. Williams, began working for Rubicon, Inc. as a lab technician in February 1979, where he remained employed until his termination in January 1995. Thereafter, Mr. Williams filed suit against Rubicon and Len Sanford, Director of Industrial Relations, (collectively referred to as "Rubicon") alleging wrongful termination under the FMLA.[2] The matter was tried in January of 1998, at which time the trial court found in favor of Rubicon, dismissing Mr. Williams' claims with prejudice. The court concluded that Mr. Williams had failed to prove by a preponderance of the evidence that Rubicon violated the FMLA or any other anti-discriminatory law when it terminated Mr. Williams. An appeal by Mr. Williams followed.

In *Williams v. Rubicon,* 98-1743, p. 11 (La.App. 1 Cir. 9/24/99), 754 So.2d 1081, 1087, *writ denied,* 99-3059 (La.1/7/00), 752 So.2d 864, this court reversed the trial court's judgment, finding that Rubicon "clearly failed to honor the statutory entitlements that Mr. Williams was afforded by the [FMLA]." We remanded the case to the trial court for a determination of damages in accordance with the pertinent provisions of the FMLA. On remand, the parties agreed to submit the matter on briefs concerning damages. After considering all pleadings and memoranda filed by the

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[2] The facts leading up to Mr. Williams' termination from Rubicon and the procedural history of this case are reported in detail in our previous opinion in this matter, *Williams v. Rubicon,* 98-1743 (La.App. 1 Cir. 9/24/99), 754 So.2d 1081, *writ denied,* 99-3059 (La.1/7/00), 752 So.2d 864.

parties, the trial court found that Mr. Williams was entitled to $127,417.00 in back pay, a like amount in liquidated damages, and $525,529.00 in front pay, for a total of $780,363.00. Further, the trial court awarded Mr. Williams $81,363.70 in attorney fees. With regard to legal interest, the court awarded legal interest on the damage award from the date the FMLA claim was initiated, November 22, 1996, and legal interest on the attorney fees award from the date of the award, May 23, 2000. A judgment in accordance with these findings was signed by the trial court on June 7, 2000.

Mr. Williams subsequently filed a motion for new trial, arguing that legal interest on his damage award should have run from the date his suit was originally filed, July 21, 1995. The trial court denied the motion. Thereafter, Rubicon appealed, assigning the following specifications of error:

> 1. The Trial Court erred in finding that Plaintiff properly mitigated his damages.
>
> 2. The Trial Court abused its discretion by awarding Plaintiff $127,417 in back pay.
>
> 3. The Trial Court erred in relying on the expert report of Dr. James Richardson in determining Plaintiff's economic damages.
>
> 4. The Trial Court abused its discretion in awarding Plaintiff liquidated damages under the Family Medical Leave Act[.]
>
> 5. The Trial Court abused its discretion in awarding Plaintiff over 20 years of front pay.
>
> 6. The Trial Court erred in awarding Plaintiff legal interest on the front pay portion of its damage award.

Mr. Williams answered the appeal, assigning error to the trial court's refusal to award legal interest from the date the suit was initially filed and the trial court's failure to award damages for mental anguish, embarrassment, and humiliation.

ANALYSIS

The purpose of the FMLA is to entitle employees to take a reasonable leave for the birth of a child, for the employee's serious health condition, or for the purpose of caring for family members with serious health conditions. 29 U.S.C. § 2612. The FMLA provides eligible employees with twelve weeks of unpaid leave and ensures the employee will be restored to their former position after they return to work. 29 U.S.C. § 2612(a)(1).

The type of damages that may be awarded when an employer violates the FMLA is set forth in 29 U.S.C. § 2617, which provides, in pertinent part, as follows:

> (1) Liability
>
> Any employer who violates section 2615 of this title shall be liable to any eligible employee affected –
>
> (A) for damages equal to –
>
> (i) the amount of –
>
> (I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or
>
> (II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual

monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee;

(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 2615 of this title proves to the satisfaction of the court that the act or omission which violated section 2615 of this title was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 2615 of this title, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and

(B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

. . . .

(3) Fees and costs

The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant.

AWARD OF BACK PAY

On appeal, Rubicon argues that the trial court's award of $127,417.00 was an abuse of discretion in two significant

ways. Initially, Rubicon contends that the trial court erred in finding that Mr. Williams mitigated his damages after his discharge from Rubicon. Rubicon asserts that Mr. Williams' "minimal attempts at securing comparable employment, his decision to take a position of uncomparable [sic] employment only 8 weeks after his termination, and his continued failure to secure comparable employment to this day do not satisfy the legal requirement that [Mr. Williams] properly mitigated his damages." Secondly, Rubicon argues that assuming Mr. Williams did properly mitigate his damages, "the trial court erred in blindly adopting [Mr. Williams'] expert's back pay calculation, a calculation that is completely unsupported and unexplained in the expert report."

A court of appeal may not overturn a judgment of a trial court absent an error of law or a factual finding that is manifestly erroneous or clearly wrong. *Stobart v. State, Department of Transportation and Development,* 617 So.2d 880, 882, n. 2 (La.1993). For an appellate court to reverse a trial court's factual finding, it must find from the record that a reasonable factual basis does not exist for the finding of the trial court and that the record establishes that the finding is clearly wrong. *Mart v. Hill,* 505 So.2d 1120, 1127 (La.1987). If the findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Furthermore, when factual findings are based on the credibility of witnesses, the fact finder's decision to credit a witness's testimony must be given "great deference" by the appellate court. *Rosell v. ESCO,* 549 So.2d 840, 844 (La.1989). Thus, when there is a conflict in the testimony, reasonable evaluations of credibility and

reasonable inferences of fact should not be disturbed upon review, although the appellate court may feel that its own evaluations and inferences are as reasonable. *Id.*

It is well settled in Louisiana that the trial court is not bound by the testimony of an expert, but such testimony is to be weighed the same as any other evidence. *Fountain v. Fountain,* 93-2176, p. 5 (La.App. 1 Cir. 10/7/94), 644 So.2d 733, 738. A trial court may accept or reject in whole or in part the opinion expressed by an expert. *Id.* The effect and weight to be given expert testimony is within the broad discretion of the trial judge. The importance placed upon such testimony is largely dependent upon the expert's qualifications and the facts that form the basis of his opinion. *Thornton ex rel. Laneco Construction Systems, Inc. v. Lanehart,* 97-2871, p. 5 (La.App. 1 Cir. 12/28/98), 723 So.2d 1127, 1130, *writ denied,* 99-0177 (La.3/19/99), 740 So.2d 115. Further, the rule that questions of credibility are for the trier of fact applies to the evaluation of expert testimony, unless the stated reasons of the expert are patently unsound. *Lirette v. State Farm Insurance Company,* 563 So.2d 850, 853 (La.1990).

With regard to Rubicon's allegation that Mr. Williams failed to mitigate his damages, he clearly has an obligation to use reasonable efforts to mitigate his damages. Rubicon, however, bears the burden of proving (1) that Mr. Williams failed to exercise reasonable diligence to mitigate his damages, and (2) there was a reasonable likelihood that Mr. Williams would have found equivalent work through exercising reasonable diligence. *See, e.g. Syvock v. Milwaukee Boiler Manufacturing Co., Inc.,* 665 F.2d 149, 159 (7th Cir. 1981). The determination of whether an employee has exercised reasonable efforts to mitigate his damages is

ultimately a question of fact for the trier of fact's consideration.

In its reasons for judgment, the trial court made the following factual findings concerning these issues:

> Mr. Williams made over $60,000.00 during his last two years at Rubicon, enjoyed excellent health care and vacation benefits, and was contributing to a 401k savings plan. He was terminated by Rubicon for alleged ethical misconduct after sixteen years of employment. On the effective date of his termination, January 31, 1995, Mr. Williams began to send out resumes. Because companies in the chemical industry generally do not offer starting salaries to lab operators based on their work experience at other businesses, Mr. Williams was at a significant disadvantage in his effort to find comparable employment with comparable pay. Unsuccessful in his attempt, Mr. Williams ultimately secured employment as a medical technician at Earl K. Long Hospital in Baton Rouge, and made almost thirty[-]five thousand dollars ($35,000.00) in 1996. The record reflects that Mr. Williams worked the midnight shift in order to provide for his wife and children.
>
> . . . .
>
> Rubicon argues that because Mr. Williams failed to take reasonable efforts to mitigate his damages, his award should be reduced by the extent of his failure. The record reflects that Mr. Williams submitted a number of job applications in the three years between his being fired and the trial. . . . Additionally, Mr. Williams had registered with Olsten Staffing and Tempco Employment Company, the same two employment agencies which Rubicon uses to locate its lab

> technicians. . . . During the three[-]year hiatus, Mr. Williams was offered one $10.00 an hour job as a laboratory technician through Olsten and had interviewed with Formosa Plastics. Despite Mr. [Williams'] sixteen years of experience, Formosa was unwilling to make an exception to its $8.00 an hour starting pay rate, a pay rate which was probably comparable to the beginning pay rate at other companies in the area. Contrary to the argument urged by Rubicon, there is no evidence that Mr. [Williams'] salary at Formosa would definitely have been increased after four years to bring it in line with his salary at Rubicon. . . .
>
> Finally, it is revealing to note that Mr. Williams was respectably employed for all but two months of the three years between his termination from Rubicon and his trial. This fact is another indication to the Court that Mr. Williams is a motivated and conscientious worker whose inability to secure comparable employment was not due to a lack of effort on his part, but to circumstances largely beyond his control.

Moreover, with regard to its reliance on the expert testimony of Dr. James Richardson in determining Mr. Williams' damages, the court noted that based on the evidence in the record, "Dr. Richardson's valuations of Mr. [Williams'] lost wages . . . are reasonable and comport with FMLA guidelines."

We have thoroughly reviewed the entire record in this matter and find that a reasonable basis exists for the trial court's factual findings. Rubicon was obligated to show that Mr. Williams' efforts to find other employment were not reasonable or diligent. We are satisfied that Rubicon was unable to carry this burden. There was sufficient,

credible evidence of Mr. Williams' efforts to mitigate his damages by attempting to secure comparable employment. As noted by the trial court, Mr. Williams submitted a number of job applications and registered with two employment agencies in an attempt to find employment. *Cf. Sprogis v. United Air Lines, Inc.*, 517 F.2d 387, 393 (7th Cir.1975) (reasonable diligence shown by plaintiff's formal application for one job and her procurement of a temporary position during a two-year period of unemployment). Further, Mr. Williams was only unemployed for two months during the three years between his termination from Rubicon and the date of his trial. Thus, we conclude there is substantial evidence in the record to support the trial court's finding that Mr. Williams' pursuit of comparable employment was reasonable, and, as such, there should be no reduction in Mr. Williams' damage award.

With regard to the trial court's award of $127,417.00 in back pay, there was conflicting testimony submitted by the two expert witnesses concerning the economic damages suffered by Mr. Williams as a result of his termination from Rubicon. After considering all of the evidence, the trial court concluded that Dr. Richardson's valuations were "reasonable" and adopted same. Dr. Richardson conducted a very thorough review of Mr. Williams' earning history at Rubicon, including his base salary, overtime earnings, bonuses, health care benefits, long-term disability and insurance benefits, and vacation time. After considering Mr. Williams' W-2 forms from his current job at Earl K. Long Hospital and comparing same to his W-2 forms from Rubicon, Dr. Richardson extrapolated the figures and determined that Mr. Williams was entitled to $127,417.00 in back pay. According to Dr. Richardson, this amount represented Mr. Williams' "pay at Rubicon from

the time of termination to the middle of January 1998 or just prior to the beginning of the trial less the pay received by Mr. Williams at Earl K. Long Hospital during the same time period." Dr. Richardson noted that the earnings were "appropriately compounded by a composite interest rate representing both short and long tern [sic] interest rates." Based on our review of the record, we cannot say there is any evidence that the reasons for Dr. Richardson's opinion were patently unsound. Thus, we find no manifest error in the trial court's reliance on Dr. Richardson's expert report. Accordingly, Rubicon's first three assignments of error are without merit.

LIQUIDATED DAMAGES

In assignment of error number four, Rubicon argues that the trial court erred in awarding Mr. Williams liquidated damages. Rubicon contends that the evidence in the record supports a finding that Rubicon acted with subjective good faith and had an objectively reasonable belief that its conduct did not violate the FMLA. Further, Rubicon asserts that the trial court erred in concluding that it was "compelled" to award liquidated damages based on this court's previous holding that Rubicon had acted with "complete disdain for the procedures set forth in the FMLA." *See Williams v. Rubicon,* 98-1743 at 10, 754 So.2d at 1087. Rubicon contends that the trial court should have made an independent determination of whether Mr. Williams was entitled to liquidated damages.

As previously indicated, an employer who violates the FMLA is liable for liquidated damages equal to the amount of actual damages and interest, unless it can prove that it undertook in "good faith" the conduct that

violated the FMLA and that it had "reasonable grounds for believing that [its action] was not a violation" of the FMLA. 29 U.S.C. § 2617(a)(1)(A)(iii). Good faith requires more than a showing of ignorance of the prevailing law or uncertainty about its development. It is not enough to show that a violation was not purposeful. Nor is good faith demonstrated by the absence of complaints on the part of employees or conformity with industry-wide practice. Good faith requires that an employer first take active steps to ascertain the dictates of the law and then move to comply with them. *Reich v. Southern New England Telecommunications Corporation,* 121 F.3d 58, 71 (2d Cir.1997). Although in the final analysis we review a trial court's decision on liquidated damages for abuse of discretion, that discretion must be exercised consistently with the strong presumption under the statute in favor of doubling. *See Walton v. United Consumers Club, Inc.,* 786 F.2d 303, 310 (7th Cir.1986). Doubling is the norm, not the exception. *Shea v. Galaxie Lumber & Construction Company, Ltd.,* 152 F.3d 729, 733 (7th Cir.1998).

In ruling on this issue, the trial court ultimately concluded that an award of liquidated damages was appropriate, finding that Rubicon had "not established by a preponderance of the evidence a reasonable and good faith belief that its actions did not violate the FMLA." Notwithstanding the deference shown by the trial court to our previous finding that Rubicon had acted with "complete disdain" for the provisions of the FMLA, the trial court clearly reviewed the evidence and determined that Rubicon had failed to prove that it acted in good faith or with a reasonable belief in the legality of its actions.

We have considered the record and agree with the trial court's finding on this issue. When questioned at trial

about Rubicon's actions in firing Mr. Williams, Len Sanford, Director of Industrial Relations, was unable to state any basis that Rubicon had for believing it was not violating the FMLA. In fact, Mr. Sanford indicated that the decision to fire Mr. Williams was based on common sense and had nothing to do with the FMLA. Further, Mr. Williams' superiors testified at trial that they had no knowledge of Rubicon providing any information to its employees regarding the provisions of the FMLA and the substantive rights created by same. Based on this evidence, it is clear that Rubicon took no active steps to ascertain the dictates of the FMLA before firing Mr. Williams. Moreover, Rubicon presented no evidence that it had reasonable grounds for believing that its acts were not a violation of the FMLA. Thus, the trial court's award of liquidated damages was warranted. This assignment of error is without merit.

AWARD OF FRONT PAY

In its final assignments of error, Rubicon argues that the trial court erred in awarding Mr. Williams over 20 years of front pay, or future lost earnings, and in awarding legal interest on the front pay portion of the damage award.[3] Rubicon contends that had Mr. Williams properly mitigated his damages, he would have found comparable employment at least by the time of trial – three years after his termination from Rubicon. Thus, Rubicon concludes, the trial court erred in awarding front pay to Mr. Williams.

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[3] While Rubicon characterizes the trial court's front pay award as over 20 years, we note that according to the record, the front pay award was actually for a period of 18 years.

Rubicon further adds that even if an award of front pay was appropriate, the length of the award in this case was an abuse of discretion.

Recently, in *Dennis v. The Finish Line, Inc.*, 99-1413 (La.App. 1 Cir. 12/22/00), 781 So.2d 12, *writ denied*, 2001-0214 (La.3/16/01), 787 So.2d 319, this court addressed the speculative nature of awards for lost future income as follows:

> Awards for lost future income are inherently speculative and are intrinsically insusceptible of being calculated with mathematical certainty. Therefore, the trier of fact is given much discretion in fixing these awards. When reviewing a trial court's award for loss of earning capacity, an appellate court should give deference to the trier of fact. An award of loss of future income is not based upon the difference between a plaintiff's earnings before and after a disabling injury. Rather, the award is predicated upon the difference between a plaintiff's earning capacity before and after a disabling injury.

Dennis v. The Finish Line, Inc., 99-1413 at 35-36, 781 So.2d at 40 (citations omitted).

In awarding front pay, a trial court must look to evidence of present factors to make a determination of future damages. This involves intelligent guesswork by the court. *Deloach v. Delchamps, Inc.*, 897 F.2d 815, 822 (5th Cir.1990). Because of the speculative nature of awards of front pay, determinations of same are left to the sound discretion of the trial court. *Id.* The factors to be considered by the court in awarding front pay are as follows: (1) the length of prior employment; (2) the permanency of the position held; (3) the nature of the work; (4)

the age and physical condition of the employee; (5) possible consolidation of jobs; and (6) the myriad of other non-discriminatory factors that could have an affect [sic] on the employee-employer relationship. *Reneau v. Wayne Griffin & Sons, Inc.,* 945 F.2d 869, 871 (5th Cir.1991).

As to the length of front pay to be awarded, there is great disparity among the United States Circuit Courts of Appeal. Some courts have upheld awards of up to five years of front pay, while many courts have awarded amounts for only up to three years. *See, e.g. Deloach v. Delchamps, Inc.,* 897 F.2d at 822 (five-year award of front pay appropriate); *Dominic v. Consolidated Edison Company of New York, Inc.,* 822 F.2d 1249 (2d Cir.1987) (two years of front pay warranted); *Snow v. Pillsbury Co.,* 650 F.Supp. 299 (D.Minn.1986) (three-year award of front pay appropriate); *Reeder-Baker v. Lincoln National Corporation,* 649 F.Supp. 647 (N.D.Ind.1986), *affirmed,* 834 F.2d 1373 (7th Cir.1987) (two-year award of front pay upheld). Still other courts have awarded front pay for a period of ten years or more. *See, e.g. Gotthardt v. National Railroad Passenger Corporation,* 191 F.3d 1148 (9th Cir.1999) (eleven-year front pay award appropriate); *Padilla v. Metro-North Commuter Railroad,* 92 F.3d 117 (2d Cir.1996) (front pay award of over twenty years appropriate under unique circumstances of case); *Hukkanen v. International Union of Operating Engineers, Hoisting & Portable Local No. 101,* 3 F.3d 281 (8th Cir.1993) (ten years of front pay warranted); *Tyler v. Bethlehem Steel Corporation,* 958 F.2d 1176 (2d Cir.1992), 506 U.S. 826, 113 S.Ct. 82, 121 L.Ed.2d 46 (1992) (front pay award for seventeen years, work life expectancy of plaintiff, was appropriate). Nonetheless, regardless of the length of a front pay award, courts have consistently held that a front

pay award is designed to be a "prospective make-whole remedy" that must be left to the sound discretion of the trial court. *Deloach v. Delchamps, Inc.*, 897 F.2d at 822.

In its reasons for judgment, the trial court noted as follows:

> Dr. Richardson testified that the present value of Mr. [Williams'] projected post-trial income loss is $525,529.00 through retirement at age sixty [-] one. Dr. Richardson based this opinion on the disparity between Mr. [Williams'] projected future income as an employee of Rubicon and his projected future income as an employee of Earl K. Long. In reaching this conclusion, Dr. Richardson found that Mr. Williams will continue to sustain the differential between his hospital employment and his former job at Rubicon for the rest of his work life. Additionally, Dr. Richardson took into account Mr. [Williams'] age (he is now forty seven) and the fact that Mr. [Williams'] employment opportunities in his field of expertise have been significantly diminished due to his termination from Rubicon for an ethical violation. Dr. Richardson['s] valuations were premised ultimately on his reasonable belief that Mr. Williams will probably never be able to recapture the salary increases that he had acquired through sixteen (16) years of exemplary service at Rubicon.

The trial court further concluded:

> [I]t is reasonable to suspect that the circumstances of [Mr. Williams'] discharge from Rubicon would have adversely impacted his ability to gain employment at Formosa (or any other major industrial company) and will continue to impede his ability to find comparable employment in the

> future. Assuming Mr. Williams was able to find such employment, there is little doubt that his upward mobility and salary within the company would be substantially and adversely affected by his inauspicious discharge from Rubicon.

Initially, we agree with the trial court's finding that Mr. Williams' termination from Rubicon will continue to impede his ability to obtain comparable employment. Moreover, we are satisfied that the trial court's reliance on Dr. Richardson's calculations was not manifestly erroneous. We note, however, that there is a discrepancy in the trial court's front pay award when compared to Dr. Richardson's report. In his January 6, 1998 report, Dr. Richardson describes his "Method of Comparison" as follows:

> Estimates of monetary damages are based on the comparison of the estimated earnings of Mr. Williams working at Rubicon, Inc. to the estimated earnings of Mr. Williams working at Earl K. Long Hospital which suggests what Mr. Williams has been able to find since his termination by Rubicon, Inc. These comparisons are continued until Mr. Williams has reached either the age of 65, or his normal worklife expectancy . . . or after a ten[-]year time horizon. Earnings will include his reported earnings based on tax returns and W-2's, including overtime and bonuses earned, and the associated benefits with his employment.

Dr. Richardson continues, summarizing estimates of Mr. Williams' front pay as follows: (1) ten-year time horizon – $335,226.00; (2) normal work life expectancy, which was determined to be age 61 for Mr. Williams – $419,092.00; and (3) retirement at age of 65 – $525,529.00.

As previously indicated, the trial court referred to Dr. Richardson's calculations of the present value of Mr. Williams' projected post-trial income loss as being "$525,529.00 through retirement at age sixty[-]one." While the trial court indicated Mr. Williams' front pay award was through retirement at age 61, the $525,529.00 award actually represents Dr. Richardson's front pay estimate through retirement at age 65. Based on our review of the trial court's reasons for judgment, we are satisfied that the trial court intended to award Mr. Williams front pay through retirement at age 65. The trial court made very specific findings concerning how Mr. Williams' termination from Rubicon will adversely impact his ability to find comparable employment in the future. Further, the court recognized that even if Mr. Williams was able to find such employment, his "upward mobility and salary within the company would be substantially and adversely affected by his inauspicious discharge from Rubicon." The trial court agreed with Dr. Richardson's finding that Mr. Williams would "probably never be able to recapture the salary increases that he had acquired through sixteen (16) years of exemplary service at Rubicon." Thus, although a front pay award of 18 years seems generous, it is warranted based on the unique circumstances of this case. Accordingly, we affirm the trial court's award of $525,529.00 in front pay through retirement at age 65.

With regard to the prejudgment interest awarded on the front pay award, it is well settled that prejudgment interest may not be awarded with respect to future damages. *Williams v. Reading & Bates Drilling Co.*, 750 F.2d 487, 491 (5th Cir.1985). An award of prejudgment interest is compensatory in nature and serves to compensate a plaintiff for the loss of the use of the money that the

plaintiff would have otherwise earned had he not been unjustly discharged. *Booker v. Taylor Milk Company, Inc.*, 64 F.3d 860, 868 (3d Cir.1995). Thus, prejudgment interest may be recovered only on damages accrued as of the date of the judgment. Accordingly, we amend the trial court's judgment to award prejudgment interest on only $254,834.00 of the total damage award, an amount that represents $127,417.00 in back pay and $127,417.00 in liquidated damages. Otherwise, we find these assignments of error are without merit.

MR. WILLIAMS' APPEAL

In answering the appeal by Rubicon, Mr. Williams assigned error to the trial court's refusal to award legal interest from the date the suit was initially filed and the trial court's failure to award compensatory damages for mental anguish, embarrassment, and humiliation.

Legal Interest

When Mr. Williams initially filed suit against Rubicon in July of 1995, he alleged defamation, intentional infliction of mental distress, and discrimination on the grounds of disability. Thereafter, on November 22, 1996, in response to a motion for summary judgment filed by Rubicon, Mr. Williams filed an opposition, wherein Mr. Williams expressed, for the first time, his intent to proceed under the FMLA. Subsequently, when the matter proceeded to trial, Mr. Williams stipulated that he would only pursue his claim for wrongful termination under the FMLA. In a judgment dated June 7, 2000, the trial court ordered that legal interest on Mr. Williams' damage award was to run from November 22, 1996, the date the FMLA

claim was formally initiated. Mr. Williams filed a motion for new trial, arguing that legal interest on his damage award should have run from the date the suit was originally filed, July 21, 1995. The trial court denied this motion, finding that Mr. Williams did not intend to assert the FMLA claim at the time the petition was initially filed.

In written reasons for judgment rendered on July 6, 2000, the trial court noted as follows:

> In the instant case, it is undisputed that the plaintiff's petition dated July 21, 1995 does not expressly assert a claim under the FMLA. More importantly, the petition does not plead sufficient facts to allow recovery under the FMLA. For instance, the petition does not assert that the plaintiff was denied leave, that Rubicon, Inc. is subject to a claim for relief under the FMLA, or that the plaintiff is a member of the class of employees entitled to recovery under that statute. On the contrary, the petition makes no mention of the FMLA. . . . (p. 142-143)

Based on our review of the record in its entirety, we find no error in the trial court's finding in this regard. Mr. Williams' petition was completely devoid of any mention of the FMLA. Rather, his petition raises various causes of action for discrimination based on disability. It was not until he filed an opposition to Rubicon's motion for summary judgment that Mr. Williams indicated his intent to pursue the FMLA claim. Thus, the trial court's award of legal interest from November 22, 1996, on Mr. Williams' damage award was proper. This assignment of error is without merit.

Compensatory Damages

In support of his argument that compensatory damages for mental anguish, embarrassment, and humiliation were warranted in this case, Mr. Williams argues that Rubicon's violation of the FMLA was a tort under La. Civ.Code art. 2315. Mr. Williams concedes that no court has ever awarded mental anguish damages based on the theory that a violation of the FMLA is a tort. He argues, however, that this is an appropriate case for such an award given the reckless nature of Rubicon's conduct.

Damages available pursuant to the FMLA are specifically limited to (1) compensatory damages equal to the amount of any wages, salary, employment benefits, or other compensation that was denied or lost by reason of the FMLA violation; (2) interest on the compensatory damages; and, under certain circumstances, (3) liquidated damages. 29 U.S.C. § 2617(a)(1)(A). In addition, a prevailing plaintiff may obtain "such equitable relief as may be appropriate, including employment, reinstatement, and promotion," as well as reasonable attorney fees and costs. 29 U.S.C. § 2617(a)(1)(B) and (a)(3). Thus, by its own terms, the FMLA does not provide for damages for mental anguish. Mr. Williams stipulated prior to the beginning of trial that his case would focus strictly on the FMLA. Further, Mr. Williams has been unable to provide any legal basis or support for his claim for mental anguish damages. Accordingly, this assignment of error is without merit.

MR. WILLIAMS' MOTION TO STRIKE PORTIONS OF RUBICON'S BRIEF

In response to Rubicon's brief on appeal, Mr. Williams filed a motion to strike certain matters from the brief. Mr. Williams argued in this motion that Rubicon had falsely accused him of "knowing concealment" of discovery documents, mislead the trial court concerning Dr. Richardson's expert report, and improperly argued evidence that was not introduced into evidence at the original trial. In an order previously issued by this court, this motion was referred to the merits. Based on our review of the record, and for the following reasons, the motion is denied in part and granted in part.

The motion to strike is denied insofar as it refers to the evidence concerning Dr. Richardson's reports. It is apparent from the record that Dr. Richardson provided two separate reports in this case. His initial report is dated December 9, 1997, and, over an objection by Mr. Williams, was introduced at trial as D-16. According to statements made by Mr. Williams' counsel at the beginning of trial, this report was, in fact, a draft submitted to opposing counsel during discovery in an attempt to reach a stipulation regarding the admission of expert reports. Counsel for Rubicon indicated that its expert had relied on Dr. Richardson's December 9, 1997 report in reviewing Mr. Williams' damages and requested that the report be introduced into evidence. On appeal, Rubicon attempts to portray this December 9, 1997 report as "*the* expert report" of Mr. Williams' expert and criticizes both the report and the trial court's acceptance of unsupported lost earnings figures. Nonetheless, we note that Dr. Richardson's second report, dated January 6, 1998, was also introduced into evidence as P-18. As explained by counsel for Mr. Williams,

this report was Dr. Richardson's final report, and was clearly the report relied on by the trial court in determining Mr. Williams' damages. However, because Dr. Richardson's December 9, 1997 report was properly introduced at trial, there is no problem with Rubicon referring to same in its appeal. Thus, any statements concerning the December 9, 1997 report need not be stricken from Rubicon's brief.

The motion to strike is granted as it relates to the remaining two issues. Rubicon argues on appeal that Mr. Williams was required to supplement his responses to prior discovery, wherein Mr. Williams had provided only four job applications that he had mailed out during his search for employment. Rubicon is apparently referring to the fact that at trial, Mr. Williams indicated that he had sent out "at least 30 applications" for employment since his discharge from Rubicon. Rubicon contends that Mr. Williams' "failure to provide Defendants with any additional application letters clearly rises to the level of knowing concealment." A review of the record reveals that both Mr. Williams and his wife testified at trial about the extensive job search that Mr. Williams undertook following his termination from Rubicon. This testimony was elicited and introduced without objection by Rubicon. Thus, any objection Rubicon had to this testimony was effectively waived. Accordingly, the portions of Rubicon's brief concerning this issue are ordered stricken from the record.

Finally, the motion is also granted as it relates to Mr. Williams' contention that Rubicon improperly submitted evidence to the trial court and to this court that was never introduced into evidence at the original trial. Mr. Williams questions Rubicon's assertion that it had hired 12 lab technicians since Mr. Williams' termination from Rubicon.

Mr. Williams correctly points out that no such evidence was introduced at the trial of this matter. Further, Mr. Williams challenges Rubicon's attempt to influence the trial court by submitting new evidence on remand despite the court's ruling that the remand would be based solely on the evidence introduced at trial. Attached to Rubicon's brief regarding damages on remand was a letter concerning the wage rates and progression system for lab technicians at the Formosa Plastics plant. It is clear from the record that said letter was never introduced into evidence at the original trial of this matter. Thus, the letter was not properly before the trial court on remand or this court on appeal. Accordingly, we conclude that any statements concerning these issues should be stricken from Rubicon's brief.

CONCLUSION

For the above-and foregoing reasons, the judgment of the trial court is amended to reflect an award of prejudgment interest on only $254,834.00 of the total damage award, an amount that represents $127,417.00 in back pay and $127,417.00 in liquidated damages. On the balance of the trial court damage award, legal interest shall accrue from the date of judgment until paid. In all other respects, the trial court's judgment is affirmed. Moreover, the motion to strike is granted in part, in accordance with the court's findings. All costs associated with this appeal are assessed against defendants-appellants, Rubicon, Inc. and Len Sanford.

AMENDED IN PART, AND AS AMENDED, AFFIRMED. MOTION TO STRIKE GRANTED IN PART, DENIED IN PART.

KLINE, J., agrees and assigns additional reasons.

KLINE, J., agrees and assigns additional reasons.

I comment only to address defendant's strenuous argument that the "front pay" award until retirement age was without jurisprudential precedent in FMLA cases and is therefore excessive. Defendants further urge that the jurisprudence which reviewed front pay awards in age discrimination and civil rights discrimination cases is not sufficiently analogous to be authoritative. An award of "front pay" has its basis, in these type violations, in the language of *each* statute authorizing courts to award a successful claimant "equitable relief." *See* 29 U.S.C. 626(b); 29 U.S.C. 2617(a)(1)(B); 42 U.S.C.2000e-5(g)(1). The statutory language authorizing equitable relief has been specifically held to be a broad grant of remedial authority allowing judges to fashion remedies designed to ensure that victims are made whole; such authority extends to front pay, in appropriate circumstances. *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724 (2nd Cir.1984). *See also Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093 (8th Cir.1982). The award must be done on a case-by-case basis, and therefore, I agree that front pay until retirement is an appropriate award under the facts of this case and does not constitute an abuse of discretion.

818 So.2d 766

Supreme Court of Louisiana

Joseph WILLIAMS

v.

RUBICON INC. and Len Sanford

No. 2002-C-0802.

June 7, 2002.

Prior report: La.App., 808 So.2d 852.

In re Rubicon Inc.; Sanford, Leonard B.; – Defendants; Applying for Writ of Certiorari and/or Review, Parish of Ascension, 23rd Judicial District Court Div. A, Nos. 56,075; to the Court of Appeal, First Circuit, No. 2001 CA 0074.

Granted.

2002 WL 31716282
833 So.2d 942

Supreme Court of Louisiana

Joseph WILLIAMS

v.

RUBICON INC. and Len Sanford.

No. 02-C-0802.

Dec. 4, 2002.

Maria N. Alessandra, Larry E. Demmons, New Orleans, Harry A. Johnson, III, Alan J. Robert, Phelps Dunbar, L.L.P., Gonzales, for applicant.

Robert B. Macmurdo, Victor L. Marcello, Talbot, Carmouche & Marcello, Gonzales, for respondent.

PER CURIAM.

Upon defendant's application, we granted certiorari in this case. *Williams v. Rubicon, Inc.*, 02-0802 (La.6/7/02), 818 So.2d 766. After hearing oral arguments and reviewing the record of the matter, we conclude that the judgment below does not require the exercise of our supervisory authority. Accordingly, we recall our order of June 7, 2002 as improvidently granted, and deny plaintiff's application.

833 So.2d 942

Supreme Court of Louisiana.

Joseph **WILLIAMS**

v.

RUBICON, INC. and Len Sanford.

No. 2002-C-0802.

Dec. 4, 2002.

Rehearing Denied as Amended Jan. 24, 2003.

Maria N. Alessandra, Larry E. Demmons, New Orleans, Harry A. Johnson, III, Alan J. Robert, Phelps Dunbar, L.L.P., Gonzales, for applicant.

Robert B. Macmurdo, Victor L. Marcello, Talbot, Carmouche & Marcello, Gonzales, for respondent.

PER CURIAM.

Upon defendant's application, we granted certiorari in this case. *Williams v. Rubicon, Inc.*, 02-0802 (La.6/7/02), 818 So.2d 766. After hearing oral arguments and reviewing the record of the matter, we conclude that the judgment below does not require the exercise of our supervisory authority. Accordingly, we recall our order of June 7, 2002 as improvidently granted, and deny plaintiff's application.

ON REHEARING

PER CURIAM.

Rehearing is granted for the sole purpose of clarifying this court's original decree. The decree of December 4, 2002 in this matter is hereby amended to read as follows:

Upon defendant's application, we granted certiorari in this case. *Williams v. Rubicon, Inc.*, 02-0802 (La.6/7/02), 818 So.2d 766. After hearing oral arguments and reviewing the record of the matter, we conclude that the judgment below does not require the exercise of our supervisory authority. Accordingly, we recall our order of June 7, 2002 as improvidently granted, and deny defendant's application.

In all other respects, rehearing is denied.

(2)

No. 02-1546

Supreme Court, U.S.
FILED
MAY 17 2003
OFFICE OF THE CLERK

In The Supreme Court of the United States

RUBICON INC. and LEONARD B. SANFORD,

Petitioners,

versus

JOSEPH E. WILLIAMS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of Louisiana For The First Circuit

RESPONDENT JOSEPH WILLIAM'S OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. THIS CASE DOES NOT RAISE THE ISSUE URGED IN PETITIONERS' WRIT APPLICATION. RUBICON WAS NOT PREVENTED AT TRIAL FROM INTRODUCING EVIDENCE TO DISPUTE THAT MR. WILLIAMS HAD A QUALIFYING HEALTH CONDITION FOR FMLA LEAVE.

Petitioners' writ issue is whether 29 USC § 2613(c)(1) of the FMLA, which provides a procedure for an employer to seek additional medical opinions if it questions an employee's qualification for leave, is "mandatory" or "merely permissive." The practical import of the "Question Presented" is whether an employer is estopped from presenting evidence at trial disputing that the employee's physical condition qualified for FMLA leave when that employer had rejected the employee's medically documented leave request without seeking the opinion of a second medical provider. Rubicon argues that when the Court of Appeal reversed the Trial Court it should have remanded to consider whether plaintiff's condition qualified for FMLA leave (thereby implying that it was restricted from litigating the issue) when a full blown trial on all issues, including whether plaintiff medically qualified for FMLA leave, had already been conducted.

An orthopedic surgeon testified via trial deposition that following knee surgery plaintiff was not capable of performing the functions of his job and was still under the doctor's care when he was fired. P-5 at p.24. An employee is eligible for FMLA leave if he has a "serious health condition" that renders him unable to perform the functions of his position. 26 USC § 2612(D). Plaintiff's surgery

and his need for continuing treatment each qualify as a "serious health condition". 26 USC § 2611(11).

Rubicon was not restrained from presenting any evidence at trial to dispute that Williams' post-surgical knee condition qualified him for FMLA leave but did not do so because it did not contend otherwise. The regular duties of Williams' chemical analyst position required the lifting of 55 gallon drums and standing while testing chemicals for long periods of time, activities that Respondent clearly could not perform at the time he was fired. Rec. 521-22. Rubicon instead argued that, independent of FMLA considerations, it could fire Williams for violating an alleged policy (the existence of which Respondent vehemently denies) that supposedly prohibited an employee from drawing paid sick leave if possibly capable of performing light duty work. When Mr. Sanford was asked if he had any basis on which to contend that Rubicon had not violated the FMLA in firing Williams, he responded, "We weren't thinking in terms of Family and Medical Leave Act, we were thinking in terms of common sense and the fact that he was being paid full medical leave under our sick leave program." Rec. 556.

The Trial Court, whereas expressing the feeling that Rubicon acted unwisely given Williams' exemplary attendance record and excellent performance, erroneously concluded that Williams' burden was to prove that his firing was motivated by anti-FMLA bias but otherwise was subject to "at-will" termination. The Louisiana appellate court reversed, holding that plaintiff had a statutory entitlement to take FMLA leave and be restored to his same position irrespective of the employer's animus. Since Rubicon ultimately conceded that Mr. Williams could not have returned to work even on light duty, the appeal court

found that there was no violation of company policy such as to provide an independent basis for firing Respondent.

The Court of Appeal opinion, while discussing the *Sims* case and the employer's opportunity to seek a second medical opinion if it questions the employee's medical documentation, does so in the context of a fully developed trial record in which the uncontradicted evidence established plaintiff's qualification for FMLA leave. The point of the discussion is that Rubicon officials disdained the FMLA, including the procedures for contesting plaintiff's medical qualification, and even through trial "substituted their own judgment for the medical opinion of Mr. Williams' treating physician." The Court earlier noted that employees with a serious health condition may take leave and then are entitled to reinstatement upon completion of that leave (citing 29 USC § 2612(a)(1)(D) and § 2614(a)(1)) and further that Mr. Sanford conceded that plaintiff was covered by the FMLA. The ultimate holding of the Court of Appeal is that Rubicon violated the FMLA by not restoring Williams to his position.

Rubicon was not restricted in any way from presenting evidence at trial to challenge the plaintiff's medical qualification for FMLA leave. The Louisiana Court of Appeal's holding does not conflict with the *Stekloff* and *Rhoads* decisions. This case does not raise the issue urged by Petitioners in their writ application.

II. WILLIAMS WAS NOT GUILTY OF ANY VIOLATION OF COMPANY POLICY, AS RUBICON ULTIMATELY CONCEDED.

Rubicon contends that the Court of Appeal ignored Rubicon's right to fire Williams (even if qualified for FMLA

leave) for a violation of company policy. Although this contention is not raised as an issue for writ consideration, Respondent feels compelled to set the record straight.

Initially, Respondent vigorously disputes that Rubicon even had a policy that a person recovering from surgery is ineligible for paid sick leave from the moment he becomes able to perform light duty work. This alleged "policy" was not in writing and the Rubicon leave forms do not even address the employee's ability to perform light duty work or not. Rec. 726, P-3, P-4. Contrary to Rubicon's assertion in its brief that plaintiff was told to ask Dr. Morgan if he was capable of performing light duty work after the knee surgery, Mr. Williams' supervisor Aki Miyagi testified that he did not even discuss plaintiff's ability to perform light duty work when Williams informed him of Dr. Morgan's order to stay off work and rehab for three weeks. Given the evidence that Rubicon was oblivious to the FMLA (neither plaintiff nor any of his supervisors had received any information or training about the FMLA), it was most implausible that Rubicon would have adopted a policy, consistent with FMLA requirements, that an employee could insist upon unpaid medical leave even though the company had light duty work it wanted him to do which he was physically capable of performing.

Williams had not missed a day of work for illness for six years prior to his knee surgery. On his own initiative, plaintiff had gone to the library and obtained a book on pre-surgery exercises hoping that he could thus speed his recovery. Williams, who had worked at Rubicon for 16 years without a single negative mark, had hoped to use some vacation time and then return to work with accommodations in order to keep his perfect attendance record intact. Rubicon has throughout the litigation cynically

parlayed plaintiff's volunteerism to perform light duty work while recuperating to concoct a fictitious "policy" which plaintiff allegedly violated.

In any event, as the Court of Appeal held, Rubicon conceded ultimately that Williams could not have returned on light duty and thus that he did not violate the alleged company policy. The evidence at trial was that after Williams was seen on the television news stretching his knee while aiding tornado victims by driving a canteen truck as a Red Cross volunteer, Rubicon's human relations director Len Sanford asked company doctor John Fraiche to contact the treating orthopedic surgeon, Joe Morgan, to determine if Williams could perform light duty work. Rec. 564. Dr. Fraiche called Dr. Morgan's office twice leaving that message; Dr. Morgan's office responded by faxing the operative report and relaying the message that plaintiff was to continue therapy and be seen by Dr. Morgan on the 31st who would then determine "work status and level of work, if any." Joint Stipulation 1, P-9.

Dr. Fraiche later spoke with Dr. Morgan and asked whether Williams was fit to perform light duty work. Joint Stip. 1. Dr. Morgan responded with a letter stating that Williams had required both cartilage removal and an additional operation to scrape out degenerative arthritic changes in two joint surfaces and further stated:

> "Following surgery it is felt that due to the extensive nature of the treatment that physical therapy was indicated. I kept him off work and sent him to physical therapy that was medically indicated. He returned on January 31, 1995. The knee was improved but continued to have some swelling and tenderness in the knee. He has not regained full strength in the knee. Again, I feel

> that physical therapy was again medically indicated for another three weeks beginning January 31, 1995. He has not been released for work at this time." P-1.

Thus, in response to Rubicon's inquiry specifically about whether Williams could perform **light duty** work, Dr. Morgan stated that as of January 31st (the effective date of plaintiff's termination), Williams was still not released to return to work in any capacity but must continue physical therapy. When confronted with Dr. Morgan's letter, Mr. Sanford admitted that Williams had not been cleared by his treating doctor to return to light duty work and thus could not have returned to perform light duty work under Rubicon's policies. Rec. 553-54. This was also confirmed by plaintiff's direct supervisor Aki Miyagi. Rec. 536-37. The Court of Appeal acknowledged Rubicon's right to fire an employee for violating a company policy, even while on medical leave, but made a finding that Williams had not been guilty of any misconduct.

III. THIS CASE DOES NOT SET ANY SIGNIFICANT PRECEDENT FOR LOUISIANA COURTS TO MERIT THIS COURT'S ATTENTION.

Petitioners contend that Respondent's counsel made only "vague and ephemeral" references to the FMLA in depositions which were allegedly inadequate notice of Respondent's intent to pursue an FMLA claim to trigger the deadline for removal. Respondent's counsel stated at Mr. Sanford's deposition in response to an inquiry as to whether Williams was asserting an FMLA claim as follows:

> "I've pled my facts, and I believe that they encompass an FMLA claim."

At Mr. Williams' deposition, Respondent's counsel is quoted as follows:

> "As I stated at the last deposition, we think the pleadings do encompass a claim and he is entitled to relief under the Family and Medical Leave Act."

Petitioners were fully aware that plaintiff was pursuing an FMLA claim but chose to try for a summary judgment in state court rather than invoke timely removal. It is questionable whether a Louisiana court will ever face an FMLA case again, much less one that turns on the issue Petitioners attempt to raise here. The Louisiana Supreme Court did not address the issue but instead denied Petitioners' writ application. This case does not set any significant precedent in Louisiana such as to merit this Court's attention.

IV. ADDITIONAL MISSTATEMENT OF FACT MADE IN PETITIONERS' APPLICATION.

In light of this Court's Rule 15(1), Respondent calls the Court's attention to an additional misstatement of fact in Petitioners' writ application besides those explicitly or implicitly addressed above. Petitioners state that they have been ordered to pay the present value of Williams' salary for the remainder of his working life when the award was for the difference in what Respondent would have made had he remained employed at Rubicon less the projection of the salary he is drawing as a lab technician on the night shift at a hospital, the best paying position which Respondent was able to find through his extensive efforts at mitigation.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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No. 02-1546

In The

Supreme Court of the United States

RUBICON INC. AND LEONARD B. SANFORD,

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On Petition For Writ Of Certiorari To The Court Of Appeal Of Louisiana For The First Circuit

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent correctly identifies the relief Petitioners are seeking, but incorrectly implies that Petitioners have already received it. Rubicon Inc. and Leonard Sanford do contend that the Louisiana appellate court "should have remanded to consider whether plaintiff's condition qualified for FMLA leave."[1] However, contrary to Respondent's suggestion, Petitioners are not suggesting that they were prevented from litigating this issue, but only that it was never decided. The trial court made extensive findings of fact, but no finding declared that Respondent's physical condition qualified him for FMLA leave.[2] Nor did the Court of Appeal make any such finding in reversing the trial court's decision.[3] It was Respondent's burden to prove that he qualified for FMLA leave,[4] and he never carried it.[5]

Instead, the Court of Appeal ruled that Rubicon committed a substantive violation of the FMLA by failing

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[1] Respondent's Opposition at p. 1.

[2] Pet. App. 16-18.

[3] *Williams v. Rubicon, Inc.*, 1998-1743 (La. App. 1st Cir. Sept. 24, 1999), 754 So.2d 1081 (Pet. App. 1).

[4] *See, e.g.*, *Satterfield v. Wal-Mart Stores, Inc.*, 135 F.3d 973 (5th Cir. 1998).

[5] Respondent contends at pp. 2 and 6 of his Opposition that Rubicon conceded he could not have returned to work, even for light duty. To the contrary, Rubicon's witnesses did no more than admit that Respondent's doctor had not cleared him for light duty because Respondent never asked to be cleared for light duty. Petitioners conceded nothing about Respondent's actual physical condition, and Respondent proved nothing. That, as well as the Louisiana appellate court's decision that failure to obtain a second medical opinion is a substantive violation of the FMLA, is why the case should be retried.

to seek a second opinion under the statute, regardless of Respondent's physical condition. In other words, Rubicon's failure to obtain a second opinion excused Respondent from the necessity of proving that his physical condition warranted FMLA leave. Thus, Respondent is absolutely wrong when he declares, "This case does not raise the issue urged by Petitioners in their writ application."[6] The issue presented to this Court by Petitioners is the following:

> Whether 29 U.S.C. § 2613(c)(1) of the Family and Medical Leave Act ("FMLA"), which provides that "the employer may require . . . that the eligible employee obtain the opinion of a second health care provider," is mandatory, as held by the Court below and several United States District Courts, or is merely permissive, as indicated by its plain language and as held by the United States Circuit Courts of Appeals for the Fourth and Eighth Circuits.[7]

In fact, as the Louisiana appellate court's decision plainly indicates, the question presented by Petitioners is the exact question ***Respondent*** placed before that court when it ruled on liability in this case. In the opinion from which Petitioners seek review, the Louisiana appellate court quoted from Respondent's brief, stating:

> Mr. Williams continues, noting that "*Rubicon violated the FMLA by failing to seek*, when it had the occasion to doubt whether [Mr.] Williams was

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[6] Respondent's Opposition at p. 3.

[7] Petition for Certiorari at p. (i).

> truly unfit to work, *the medical certification explicitly required in such a situation.*

(emphasis added).[8]

Respondent's contention that the failure to seek a second opinion under the FMLA is a substantive violation of the FMLA in and of itself was rejected by the federal circuit courts in *Stekloff v. St. John's Mercy Health Systems,* 218 F.3d 858 (8th Cir. 2000) and *Rhoads v. FDIC,* 257 F.3d 373 (4th Cir. 2001), *cert. denied*, 535 U.S. 933 (2002), and should now be rejected by this Court.

Prompted by the invitation from Respondent and emboldened by the California District Court's decision in *Sims v. Alameda-Contra Costa Transit District*, 2 F.Supp.2d 1253 (N.D. Cal. 1998), the Louisiana appellate court adopted the position advocated by Respondent and *Sims* and held that Petitioners violated Respondent's substantive rights under the FMLA by failing to follow the FMLA's procedures for obtaining a second medical opinion:

> After a review of the record in this case, it is clear that Rubicon did not honor Mr. Williams' substantive rights pursuant to the FMLA. *Rubicon failed to follow the procedures set forth in the FMLA for obtaining the required medical certification* regarding the 'serious health condition' that prevented Mr. Williams from performing the functions of his job.

(emphasis added).[9]

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[8] *Williams v. Rubicon, Inc.*, 1998-1743 (La. App. 1st Cir. Sept. 24, 1999), 754 So.2d 1081 (Pet. App. 8-9).

[9] *Id.* (Pet. App. 9).

Based on the preceding excerpt, there can be no doubt that the Louisiana appellate court's decision was grounded in its belief that the second opinion procedures set forth in the FMLA were mandatory and thus Petitioners' failure to follow those procedures was a substantive violation of the FMLA. Thus, it is clear that the question presented to this Court by Petitioners is exactly the question that was decided by the Louisiana Court of Appeal.

Turning to that question, the law is clear in the federal circuit courts that the second opinion procedures set forth in the FMLA are permissive, not mandatory; therefore failure to obtain a second medical opinion cannot serve as the basis for a substantive violation of the FMLA.[10] As a result of the Louisiana appellate court's decision in this case, the law in Louisiana is different.

Louisiana state courts are not bound by the federal circuit courts, only the rulings from this Court.[11] Thus, absent this Court's reversal of the Louisiana appellate court's decision in this case, an employer in Louisiana will be subject to a different (and erroneous) standard under the FMLA simply because of geographic happenstance. Armed with the Louisiana appellate court's decision in this case, an employee alleging a violation of the FMLA can walk into a Louisiana state court and obtain damages simply because the employer declined to exercise his

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[10] *See Stekloff,* 218 F.3d 858 (8th Cir. 2000) and *Rhoads,* 257 F.3d 373 (4th Cir. 2001), *cert. denied*, 535 U.S. 933 (2002).

[11] *See State v. Sanders,* 93-0001 (La.11/30/94); 648 So.2d 1272, *cert. denied,* 517 U.S. 1246, 116 S.Ct. 2504, 135 L.Ed.2d 194 (1996) (in matters involving federal law, state courts are bound only by decisions of the United States Supreme Court).

optional right to seek a second medical opinion. As explained fully in the Petition for Certiorari, it is this kind of conflict and potential uneven application of federal law that clamors for this Court's review. The question presented to this Court is an issue of law. This Court should not fall prey to Respondent's tactic in attempting to divert attention away from this important legal issue by characterizing this dispute as one of fact or credibility.

Notably absent from Respondent's Opposition is any substantive discussion of *Sims*, *Rhoads* and *Stekloff*. Such an omission is telling. Respondent's efforts to mire this Court into a discussion of irrelevant facts and testimony is a product of Respondent's inability to contest the legal issue before this Court. The federal circuit courts' decisions in *Rhoads* and *Stekloff* are clear and resoundingly repudiate the holding by the Louisiana appellate court. As explained in *Rhoads*:

> We agree with the Eighth Circuit's assessment in *Stekloff*. . . . The FMLA provides only that an employer "may" seek a second, or third, opinion. . . . Because the term "may" is permissive, the plain language of the statute indicates that an employer who questions the validity of a certification has the option of seeking a second or third opinion, without being required to do so.[12]

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[12] *Rhoads*, 257 F.3d at 385-86.

CONCLUSION

Because an employer "may" seek a second or third opinion under the FMLA, the decision not to seek that opinion cannot be a substantive violation of the statute. The Louisiana appellate court's decision to the contrary is clearly wrong. Petitioners respectfully request that this Court grant its Petition for Certiorari and resolve the conflict between the Louisiana appellate court's decision and the federal circuit court decisions in *Stekloff v. St. John's Mercy Health Systems,* 218 F.3d 858 (8th Cir. 2000), and *Rhoads v. FDIC,* 257 F.3d 373 (4th Cir. 2001), *cert. denied*, 535 U.S. 933 (2002).

Respectfully submitted,

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